

In the Supreme Court of the United States

October Term, 1987

NEW ENERGY COMPANY OF INDIANA,

Appellant,

v.

JOANNE LIMBACH,

TAX COMMISSIONER OF OHIO, MARY ELLEN WITHROW,
TREASURER OF OHIO, and SOUTH POINT ETHANOL,

Appellees.

On Appeal from the Supreme Court of Ohio

JOINT APPENDIX

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Jurisdictional Statement Filed October 22, 1987

Probable Jurisdiction Noted December 14, 1987

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DOCKET ENTRIES

Complaint, filed February 6, 1985.

Motion for Preliminary Injunction, filed February 7, 1985, and *Notice of Hearing*, set for February 27, 1985.

Answer of Defendants, filed March 12, 1985.

Entry, filed March 19, 1985. Plaintiff's motion for preliminary injunction consolidated with hearing on merits & trial on merits, March 29, 1985.

Motion To Intervene as a Defendant, served March 25, 1985—South Point Ethanol. Answer attached as Ex. A.

Answer of New Party Defendant South Point Ethanol, served March 27, 1985.

Journal Entry, filed March 27, 1985. South Point Ethanol has leave to intervene and made party.

Agreed Findings of Fact, filed April 3, 1985.

Amended Agreed Findings of Fact, filed April 10, 1985.

Filings of Which the Court is Requested to Take Judicial Notice, filed April 11, 1985.

Decision and Judgment Entry, filed April 23, 1985.

Notice of Appeal, filed April 24, 1985.

Judgment Entry, received April 29, 1985.

Motion For Expedited Hearing and Decision, filed April 29, 1985.

Opinion and Order, filed May 8, 1986.

Journal Entry of Judgment, filed May 8, 1986. Assignments of error OVERRULED; South Point's cross-assignment of error OVERRULED; Judgment of Franklin County Court of Common Pleas AFFIRMED.

Notice of Appeal to the Supreme Court of Ohio, filed May 14, 1986.

Motion for Expedited Argument, Filed August 15, 1986.

DOCKET ENTRIES—Continued

Notice of Hearing, Received November 7, 1986.

Judgment Entry Reversing Judgment of Court of Appeals, with Opinion written by Judge Clifford J. Brown, and dissenting opinion written by Judge Holmes, Dated December 26, 1986.

Motion of Appellee South Point Ethanol for Rehearing, Filed January 5, 1987.

Rehearing Entry, Dated January 21, 1987.

Supreme Court Announcement List, Dated January 28, 1987.

Motion of Appellant for Supersedeas or Injunctive Relief; for Correction of the Announcement List Dated January 28, 1987 and for Expedited Proceedings, Filed February 3, 1987.

Entry (Denying Injunctive Relief; Denying Correction of Announcement List; Granting Expedited Proceedings, Dated February 25, 1987.

Notice of Hearing on April 1, 1987, Dated March 6, 1987.

Motion of Appellant for Nunc Pro Tunc Order, Filed March 9, 1987.

Motion for Leave to File Amicus Curiae Brief, Served March 10, 1987.

Amicus Curiae Brief of Marathon Petroleum Company Urging Reversal, Served March 10, 1987.

Entry denying *non pro tunc* order, Dated March 25, 1987.

Entry granting motion to file brief amicus curiae, Dated March 25, 1987.

Opinion and Order affirming Court of Appeals, September 2, 1987.

DOCKET ENTRIES—Continued

Motion of Appellant New Energy Company of Indiana for a Writ of Supersedeas or, In The Alternative, for Interim Injunctive Relief, filed September 11, 1987.

Notice of Appeal to The Supreme Court of The United States, filed October 9, 1987.

Jurisdictional Statement, filed October 22, 1987.

Probable Jurisdiction Noted, December 14, 1987.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

NEW ENERGY COMPANY OF)
INDIANA,)
3201 W. Calvert)
P.O. Box 2289)
South Bend, Indiana 46680)
)
Plaintiff,)
)
v.)
)
JOANNE LIMBACH,)
TAX COMMISSIONER,)
STATE OF OHIO)
30 East Broad Street)
Columbus, Ohio 43215)
)
and)
)
MARY ELLEN WITHROW,)
TREASURER, STATE OF OHIO)
30 East Broad Street)
Columbus, Ohio 43215,)
)
Defendants.)

Case No.
85CV-02-712

COMPLAINT

1. This is an action for declaratory and injunctive relief brought pursuant to the provisions of Chapters 2721 and 2723 of the Ohio Revised Code. This action challenges the constitutionality of Ohio's new Ethanol Reciprocal Tax Credit legislation which creates a discriminatory and impermissible burden on interstate commerce.

The Parties

2. Plaintiff, New Energy Company of Indiana ("New Energy"), is an Indiana limited partnership engaged in interstate commerce in the business of manufacturing ethanol, an ingredient used in the blending of gasoline. New Energy was formed in 1982 and currently has a capital base of approximately \$185,000,000. There are approximately 3,300 limited partners in New Energy who have contributed approximately \$40 million in capital and have guaranteed an additional \$20 million of debt. The capitalization of New Energy includes bank loans in the approximate amount of \$140 million 90% of the principal and interest of which are guaranteed by the United States Department of Energy; direct loans from the United States Department of Energy and a direct loan from the South Bend Development Corp. which received an Urban Development Action Grant from the United States Department of Housing and Urban Development to assist in the development and construction of New Energy's ethanol production facility.

3. Joanne Limbach is the Tax Commissioner of the State of Ohio. Mary Ellen Withrow is the Treasurer of the State of Ohio. Together, the defendants are charged with the responsibility for administering and enforcing Ohio Revised Code Chapter 5735 dealing with motor vehicle fuel taxes.

The Facts

4. Ethanol is a high octane additive which is blended in ratios of up to 10% with gasoline. Blends of 90% gasoline and 10% ethanol are sometimes known as gasohol.

Ethanol is sold by manufacturers like New Energy to wholesalers, distributors, retail gasoline service station operators and others who, in turn, blend it with gasoline.

5. In order to encourage the use of ethanol, the United States Congress has enacted PL 96-294 ("The Energy Security Act"), which *inter alia*, provides for a lower federal excise tax on ethanol blends than on gasoline; 26 U.S.C. § 4081. Current federal law exempts ethanol blends from 6 cents of the 9 cent federal excise tax on gasoline. Approximately 32 states, including Ohio, have granted additional discounts, credits, exemptions or refunds for ethanol blends from their respective state sales taxes on gasoline. The use of ethanol advances national and state interests by expanding the agricultural markets in the United States and by reducing dependence on foreign oil.

6. Pursuant to Revised Code §§ 5735.05, 5735.25, 5735.29 and 5735.30, Ohio had a policy of providing a credit of 35¢ per gallon of ethanol when blended with gasoline in not more than 10% ratio and used, sold, or distributed by dealers in Ohio. This credit was available on all ethanol blends used, sold, or distributed by dealers in Ohio, regardless of where the ethanol ingredient of such blends were manufactured.

7. The tax treatment of ethanol-containing products was radically altered on December 20, 1984 when the Ohio General Assembly enacted R.C. § 5735.145 which provides as follows:

Sec. 5735.145 (A) As used in this section, and Sections 5735.13, 5735.14, 5735.141, 5735.142, 5735.146, and 5735.17 of the Revised Code:

(1) "Qualified fuel" means ethanol that is to be combined with gasoline to create a blend of not more than ten per cent by volume of ethanol and that when so blended is used, sold, or distributed as a motor vehicle fuel.

(2) "Ethanol" means:

(a) Ethanol produced in a manufacturing facility with an annual production capacity of less than two million gallons from wood or the grain of a cereal grass and denatured in accordance with United States Bureau of Alcohol and Tax Regulations; or

(b) Ethanol produced through a coal-fired process from wood or the grain of a cereal grass and denatured in accordance with United States Bureau of Alcohol and Tax Regulations.

(3) "Federal Gasohol Credit" means the amount per gallon on the last day of each month by which the federal tax on gasoline exceeds the federal tax on gasohol imposed under 26 U.S.C.A. 4081.

(4) "Qualified Fuel Credit" means thirty-five cents per gallon of qualified fuel minus the amount produced by the following computations:

(a) Subtract five cents from the federal gasohol credit. If the difference is a negative number, the qualified fuel credit shall be thirty-five cents, and no further computations shall be required.

(b) Multiply the difference thus obtained by ten. If the product exceeds thirty-five cents, the qualified fuel credit shall be zero.

The tax commissioner shall make such computations on the first day of each month, and the result of such computations shall be the cents per gallon qualified fuel credit for that month and each month thereafter until the amount of such credit is changed by the computations required by this division.

(B) *The qualified fuel otherwise eligible for the qualified fuel credit shall not contain ethanol produced outside Ohio unless the Tax Commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing ethanol produced in Ohio; provided however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio.*

(C) Any dealer in motor vehicle fuel shall receive a credit on each gallon of qualified fuel used, sold, or distributed by the dealer and on which the dealer is liable for the taxes imposed by sections 5735.05, 5735.25, 5735.29, and 5735.30 of the Revised Code. To receive a credit, the dealer shall certify on the monthly report required by section 5735.06 of the Revised Code the number of gallons of qualified fuel used, sold, or distributed during the month to which the report applies and upon which such taxes are imposed. After computation of the amount of the tax in accordance with division (B) of section 5735.06 of the Revised Code, the number of gallons of qualified fuel used, sold, or distributed during the month to which the report applies and included in the gallons of motor vehicle fuel upon which the tax is imposed shall be multiplied by the cents per gallon qualified fuel credit applicable to that month. The resulting product shall be subtracted from the tax computed under division (B) of section 5735.06 of the Revised Code and shall constitute the credit provided by this section.

[Emphasis added]

8. The newly-enacted statute has a significant adverse effect upon plaintiff and will prevent plaintiff from competitively marketing its product in the State of Ohio. As interpreted by the State Tax Commissioner, the newly-

enacted Revised Code § 5735.145 will have the effect of denying some or all of the Ohio credit for blends used, sold, or distributed by Ohio dealers if the ethanol ingredient of the blend is manufactured in a state that does not give a credit in the same amount to ethanol manufactured in Ohio. In essence, the newly-enacted statute contains an impermissible reciprocal sales tax exemption.

9. The impact of the reciprocal sales tax exemption is being felt by plaintiff on a graduated basis during the period of January 1, 1985 through July 1, 1985. By July 1, 1985 the full effects and impact of the statute will be borne by plaintiff.

10. Plaintiff first began manufacturing and selling ethanol at its plant in South Bend, Indiana in October, 1984. Plaintiff currently sells a substantial portion of its production to Ohio purchasers for resale within the State of Ohio. In January, 1985 plaintiff sold approximately 262,000 gallons of ethanol in Ohio which were affected by the newly-enacted reciprocal sales tax statute. Plaintiff has also contracted to sell up to 1,000,000 gallons of ethanol per month to an Ohio dealer on a formula price basis. A major component of the formula's price is the Ohio credit. It is estimated that plaintiff will offer for sale approximately 1.7 million gallons of ethanol per month for resale in ethanol blends in the State of Ohio by July 1, 1985 and that this will constitute approximately 40% of plaintiff's monthly production of ethanol.

11. The prices paid to plaintiff by purchasers of ethanol are directly proportional to the amount of credit, exemption, discount or rebate from the sales or excise taxes imposed on resale dealers by the defendants. The

clear and unmistakable effect of the decreased exemptions or credits afforded plaintiff's product under the reciprocal sales tax exemption will be to significantly decrease the price paid to plaintiff by the retail purchasers of its product.

12. During the month of January, 1985 with the newly-enacted statute only partially phased into effect, plaintiff lost 10¢ per gallon on the sale of product affected by the statute. During the interim until July 1, 1985, plaintiff will continue to suffer monetary loss and will further suffer loss of customers and market position. Once the full effects of the statute are in place in July 1985, plaintiff's product will be subject to a 25¢ per gallon tax in addition to what is currently being assessed against the product. Based upon plaintiff's projected sales estimates, the discriminatory tax will subject plaintiff's product to an additional \$425,000 per month in taxes. Plaintiff's competitors who manufacture ethanol in Ohio will receive a 25¢ per gallon credit and be relieved of this additional burden.

13. The additional taxes imposed upon plaintiff's product are levied solely because the state in which the product is manufactured (Indiana) does not provide a specific credit or exemption for ethanol produced in Ohio. The Ohio taxing scheme is retaliatory and discriminatory against plaintiff's product and has the effect of placing plaintiff at a severe competitive disadvantage.

14. Defendants have interpreted the challenged legislation to require adjustment of plaintiff's credit by an unknown amount on a monthly basis until July 1, 1985 when the credit will terminate. This creates chaos in plaintiff's market. Plaintiff will continue to lose customers and will

be unable to schedule appropriate production. Given the current and forecast market for ethanol and the fact that New Energy is a new company, plaintiff will not find readily available alternative markets for its expected production. The maintenance of forecasted production rates is critical to New Energy's ability to satisfy its financial obligations and remain in existence.

15. The above could also cause many millions of dollars in losses to the United States Department of Energy and to thousands of limited partners throughout the country.

16. The injuries set forth herein are immediate and irreparable and plaintiff has no adequate remedy at law.

First Claim for Relief

17. Plaintiff realleges paragraphs 1-16 as if fully rewritten.

18. Section 5735.145(B) of the Revised Code of Ohio, as amended by Am. Sub. S.B. 334 of the 115th General Assembly, December 20, 1984, violates the Commerce Clause of the United States Constitution, Article 1, § 8, cl. 3, on its face and as applied because it discriminates against plaintiff and other manufacturers who sell, transfer or otherwise convey ethanol not manufactured in Ohio for use in gasoline sold in Ohio. Section 5735.145(B) thus discriminates against and imposes an impermissible burden on interstate commerce. It favors in-state manufacturers of ethanol to the disadvantage of out-of-state manufacturers.

Second Claim for Relief

19. Plaintiff realleges paragraphs 1-18 as if fully rewritten.

20. Section 5735.145(B), as amended, violates plaintiff's rights under the Privileges and Immunities Clause of the United States Constitution, Art. 4, § 2, because it deprives plaintiff of privileges and immunities afforded those who deal in ethanol manufactured in Ohio. The 1984 amendment to § 5735.145(B) violates the privileges and immunities clause by creating an economic barrier for ethanol manufactured outside Ohio thereby unreasonably discriminating against plaintiff and others who deal in ethanol manufactured outside Ohio.

Third Claim for Relief

21. Plaintiff realleges paragraphs 1-20 as if fully rewritten.

22. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the law." The 1984 Amendment to § 5735.145(B) violates the equal protection clause because its purpose and effect is to discriminate in favor of those dealing in Ohio ethanol, and to bestow undue economic advantage upon Ohio-manufactured ethanol by diverting business from those dealing in ethanol manufactured outside Ohio. This statutorily created classification is not reasonably related to any legitimate purpose of the legislation.

Fourth Claim for Relief

23. Plaintiff realleges paragraphs 1-22 as if fully rewritten.

24. Section 5735.145(B), as amended, violates the Constitution of Ohio by denying plaintiff equal protection

of law and granting Ohio producers of ethanol special privileges and immunities contrary to Article I, § 2 and Article II, § 26 of the Ohio Constitution.

WHEREFORE plaintiff demands judgment as follows:

A) A declaratoion that R.C. § 5735.145(B), as amended, which provides for a reciprocal tax credit is unconstitutional as being violative of the United States and Ohio Constitutions.

B) A preliminary and permanent injunction against defendants from implementing or enforcing the unconstitutional provisions of R.C. § 5735.145, as amended.

C) Such other further relief as may be appropriate, including the recovery of attorneys' fees and costs.

/s/ _____
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/s/ _____
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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

NEW ENERGY COMPANY
OF INDIANA,

Plaintiff,

vs.

JOANNE LIMBACH,
TAX COMMISSIONER,
STATE OF OHIO,

and

MARY ELLEN WITHROW,
TREASURER, STATE OF OHIO,

Defendants.

Case No.
85CV-02-712

JUDGE
CRAWFORD

ANSWER OF DEFENDANTS
FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. The court lacks jurisdiction over the subject matter.

THIRD DEFENSE

3. R.C. 5703.38 prohibits the court from granting the injunctive relief demanded by plaintiff.

FOURTH DEFENSE

4. Plaintiff lacks standing to sue with respect to the injunctive relief sought under R.C. 2723.01.

FIFTH DEFENSE

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 10, 11, and 15 of the complaint.

6. In response to paragraph 3 of the complaint, defendants admit that defendant Joanne Limbach, Tax Commissioner of Ohio, is charged with the responsibility of administering and enforcing R.C. Chapter 5735, but deny that defendant Mary Ellen Withrow, Treasurer of State, is charged with that responsibility.

7. In response to paragraph 4 of the complaint, defendants admit each of the allegations contained therein except that defendants are without knowledge or information sufficient to form a belief as to the allegation that ethanol is sold to retail gasoline service stations.

8. In response to paragraph 5 of the complaint, defendants admit the allegations contained therein regarding the federal incentives but are without sufficient knowledge or information to form a belief as to the truth of the allegations regarding the scope of the states' tax provisions concerning ethanol.

9. In response to paragraph 6 of the complaint, defendants admit that the allegations contained therein correctly state the law as it existed prior to January 1, 1985.

10. In response to paragraph 7 of the complaint, defendants admit the allegations contained therein with the exceptions of the statement that the tax treatment of ethanol blended gasoline was altered on December 20, 1984.

The enactment of R.C. 5735.145 became effective on January 1, 1985.

11. In response to paragraph 8 of the complaint, defendants admit the allegation contained in the second sentence of that paragraph, deny the allegation contained in the third sentence of that paragraph and are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of that paragraph.

12. In response to paragraph 9 of the complaint, defendants deny that there is any sales tax exemption regarding ethanol. Assuming that plaintiffs meant to refer to the motor vehicle fuel tax credit, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

13. In response to paragraph 12 of the complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except that defendants deny that plaintiff's product will be subject to an additional 25¢ per gallon tax or that a tax is currently being assessed against its product or that plaintiff's competitors will receive a 25¢ per gallon credit.

14. In response to paragraph 13 of the complaint, defendants deny that additional taxes are imposed upon plaintiff's product and that Ohio's taxing scheme is retaliatory and discriminatory against plaintiff's product. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that Ohio's taxing scheme places plaintiff at a severe competitive disadvantage.

15. In response to paragraph 14 of the complaint, defendants deny the allegation contained in the first sentence of that paragraph; the credit provided by the challenged legislation is available only to motor vehicle fuel dealers and plaintiff is not such an entity. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 14 of the complaint.

16. In response to paragraph 16 of the complaint, defendants admit that plaintiff has no adequate remedy at law. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 16 of the complaint.

17. Defendants deny each and every allegation contained in paragraphs 18, 20, 22, and 24 of the complaint.

ANTHONY J. CELEBREZZE, JR.
Attorney General

/s/ Richard C. Farrin
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DEFENDANTS

JOANNE LIMBACH
TAX COMMISSIONER OF OHIO

MARY ELLEN WITHROW
TREASURER OF THE
STATE OF OHIO

(Certificate of Service omitted)

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

NEW ENERGY COMPANY)	
OF INDIANA)	
)	
Plaintiff,)	
)	
vs.)	
	)	Case No.
JOANNE LIMBACH,	)	85CV-02-712
TAX COMMISSIONER, <i>et al.</i> ,)	
	)	JUDGE
and	)	CRAWFORD
)	
SOUTH POINT ETHANOL)	
P.O. Box 1004)	
South Point, Ohio 45680,)	
)	
New Party Defendant.)	

ANSWER OF NEW PARTY DEFENDANT
SOUTH POINT ETHANOL

For its answer to the Complaint, new party defendant South Point Ethanol ("South Point"), admits, denies and alleges as follows:

1. Admits that the plaintiff purports to bring this action pursuant to the provisions of Chapter 2721 and 2723 of the Ohio Revised Code and seeks to challenge the constitutionality of certain Ohio statutes, and denies the remaining allegations contained in paragraph 1 of the Complaint.

2. Alleges that it is without sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the Complaint.

3. Admits that Joanne Limbach is the Tax Commissioner of the State of Ohio and that Mary Ellen Withrow is the Treasurer of the State of Ohio.

4. Admits that ethanol is a high octane additive which is blended in ratios of up to 10% with gasoline and that blends of 90% gasoline and 10% ethanol are sometimes known as gasohol, but alleges it is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 4 of the Complaint.

5. Admits that Congress has enacted P.L. 96-294 and alleges that the terms thereof speak for themselves.

6. Admits that prior to January 1, 1985, Ohio had a credit for ethanol used, sold or distributed by dealers in Ohio regardless of where the ethanol was produced.

7. Admits that the Ohio General Assembly enacted Ohio Rev. Code § 5735.145, and alleges that the terms thereof speak for themselves.

8. Admits that the Tax Commissioner has correctly interpreted Ohio Rev. Code § 5735.145 to deny the Ohio credit for ethanol manufactured in a state that does not give a similar tax benefit to ethanol manufactured in Ohio, denies that the statute contains an impermissible exemption, and alleges it is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 8 of the Complaint.

9. Alleges it is without sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 9 of the Complaint.

10. Alleges that it is without sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 10 of the Complaint.

11. Alleges that it is without sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 11 of the Complaint.

12. Denies that the statute is discriminatory, and alleges that it is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 12 of the Complaint.

13. Denies the allegations contained in paragraph 13 of the Complaint.

14. Alleges it is without sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 14 of the Complaint.

15. Alleges it is without sufficient information to form a belief as to the truth of the allegations contained in paragraph 15 of the Complaint.

16. Denies the allegations contained in paragraph 16 of the Complaint.

17. Incorporates the admissions, denials and allegations contained in paragraphs 1-16 as though fully rewritten herein.

18. Denies the allegations contained in paragraph 18 of the Complaint.

19. Incorporates the admissions, denials and allegations contained in paragraphs 1-17 as though fully rewritten herein.

20. Denies the allegations contained in paragraph 20 of the Complaint.

21. Incorporates the admissions, denials and allegations contained in paragraphs 1-20 as though fully rewritten herein.

22. Denies the allegations contained in paragraph 21 of the Complaint.

23. Incorporates the admissions, denials and allegations contained in paragraphs 1-22 as though fully rewritten herein.

24. Denies the allegations contained in paragraph 22 of the Complaint.

25. Denies each and every allegation contained in the Complaint not herein expressly admitted to be true.

FIRST DEFENSE

26. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

27. Plaintiff lacks standing to sue with respect to the claims contained in the Complaint.

THIRD DEFENSE

28. Plaintiff has failed to comply with the statutory requirements for commencing an action in Ohio.

WHEREFORE defendant South Point prays that the Complaint be dismissed at the plaintiff's costs.

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IN THE COURT OF COMMON PLEAS
 FRANKLIN COUNTY, OHIO

NEW ENERGY COMPANY)	
OF INDIANA,)	
	)	Case No.
Plaintiff,	)	85CV-02-712
)	
v.	)	Judge Crawford
)	
JOANNE LIMBACH,	)	(Filed April 10,
TAX COMMISSIONER, et al.,	)	1985)
)	
Defendants.)	

AMENDED AGREED FINDINGS OF FACT

The parties agree that the record in this case supports these Agreed Findings of Fact. This agreement does not waive any objection by any party as to the relevancy of any agreed fact nor does it limit any party from proposing any additional findings of fact.

1. The plaintiff, New Energy Company of Indiana ("New Energy"), is an Indiana limited partnership engaged in Commerce among the states in the business of manufacturing ethanol. The plaintiff's manufacturing facility is located in South Bend, Indiana (Tr. 5). The plaintiff is the only ethanol manufacturer with production facilities in Indiana. Ethanol produced by New Energy is presently sold to blenders in several states including Ohio, Indiana and Illinois. (Plaintiff's Exs. 1 and 2)

2. New Energy was formed in 1980 and fully capitalized in 1982 by a public offering. The equity capital invested in the entity is \$40,000,000 and the equity inves-

tors guaranteed an additional \$20,000,000 in loans to the partnership (Tr. 5).

3. The total project cost of the New Energy facility was in excess of \$185,000,000. Approximately \$150,000,000 of the project cost was funded by bank loans, the principal of which is 90% guaranteed by the United States Department of Energy pursuant to the Energy Security Act of 1980. The United States Department of Energy has also made a direct loan to New Energy in the amount of \$1,769,000 (Tr. 7).

4. The state defendants are Joanne Limbach, Tax Commissioner of the State of Ohio, and Mary Ellen Withrow, Treasurer of the State of Ohio. Together these defendants are charged with the responsibility of administering and enforcing R.C. Chapter 5735 dealing with motor vehicle fuel taxes.

5. South Point Ethanol ("South Point") intervened in this action as a defendant on March 27, 1985. South Point is a joint venture between Ashland Oil Company, the Ohio Farm Bureau, UGI and Publicker Industries which produces ethanol in Lawrence County, Ohio.

6. South Point was formed in 1981 to retrofit a closed chemical plant. Its facility is located in South Point, Ohio. The joint venturers have invested approximately \$120,000,000 in South Point. Additionally, South Point provides approximately 185 jobs and expends \$100,000,000 annually in the production of ethanol from corn.

7. The plaintiff's complaint seeks a declaration that Ohio R.C. § 5735.145(B), as amended, is unconstitutional as being violative of the United States and Ohio Constitu-

tions. The complaint further seeks a preliminary and permanent injunction against defendants from implementing and enforcing the allegedly unconstitutional provisions.

8. Defendants answered the complaint and raised the affirmative defenses of failure to state a claim upon which relief can be granted, lack of jurisdiction over the subject matter, lack of standing to maintain the action and failure to comply with statutory requirements for commencing an action. In addition, the defendants allege that R.C. § 5703.38 prohibits the Court from granting the injunctive relief demanded by plaintiff and that plaintiff lacks standing to sue with respect to injunctive relief sought under R.C. § 2723.01.

9. Ethanol is a 199 proof alcohol. It is derived from corn which is treated with enzymes that convert the starch to sugar and ultimately into alcohol. Ethanol is mixed with gasoline in a 10/90% ratio to form a blend commonly referred to as gasohol (Tr. 14).

10. Ethanol is beneficial as a fuel additive to increase the octane rating of gasoline without contributing any additional lead into the environment. Ethanol is, in fact, the cost effective replacement for lead in gasoline and is the most environmentally benign replacement for lead. The production of ethanol also provides an outlet for the sale of corn surpluses (Tr. 9).

11. Various governmental bodies have initiated programs to encourage the production of ethanol. The United States Department of Energy grants for feasibility studies and guarantees 90% of certain qualifying loans (Tr. 9). To encourage the use of ethanol, the Department of Treas-

sury exempts ethanol/gasoline blends from 6¢ of the 9¢ federal excise tax on gasoline (Tr. 9). In addition, at least thirty-two states allow credits from their respective motor fuel taxes for ethanol/gasoline blends (Tr. 10). The provision of tax credits has been the best method adopted by the federal and state government to encourage the use of ethanol.

12. Ohio imposes a tax on dealers for each gallon of gasoline sold in Ohio. This tax is not imposed on, paid by, or collected by New Energy, South Point or any other producer of ethanol. Prior to January 1, 1985, Ohio law provided a tax credit of 35 cents per gallon for each gallon of ethanol blended with gasoline in not more than a 10% ratio and used, sold, or distributed by dealers in Ohio. This credit was available to dealers on all ethanol blends used, sold, or distributed in Ohio, regardless of where the ethanol ingredients of such blends were made (Tr. 19). (Plaintiff's Exs. 5 and 6)

13. Ohio's tax treatment of ethanol containing products was altered by the enactment of R.C. § 5735.145(B) which limits the availability of the credit to Ohio produced ethanol and ethanol produced in states which grant similar credits to ethanol produced in Ohio and sold within that state (Tr. 23). The newly enacted R.C. § 5735.145(B) provides that:

The qualified fuel otherwise eligible for the qualified fuel credit shall not contain ethanol produced outside Ohio unless the Tax Commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing

ethanol produced in Ohio; provided however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio.

Prior to the adoption of R.C. § 5735.145(B) representatives of South Point testified before the House Ways and Means Committee of the Ohio General Assembly regarding all of the benefits of the use of ethanol, including, among other things, the public health benefits of its use as a substitute for lead as an octane enhancement in gasoline.

14. But for the enactment and operation of R.C. § 5735.145(B) plaintiff would receive identical tax treatment by the Ohio authorities as that accorded to any other Ohio dealer or producer of ethanol. The validity or invalidity of sub-section (B) does not affect any other provision of or the application of R.C. § 5735.145.

15. The tax credit provided for in R.C. § 5735.145(B) has been applied in the manner provided by R.C. Chapter 5735 on the ethanol sold by plaintiff in Ohio during January and February of 1985 (Tr. 25). (Plaintiff's Exs. 3 and 4).

16. The impact of the application of R.C. § 5735.145 is being felt by the plaintiff on a graduated basis during the period of January 1, 1985 through July 1, 1985. Dealers of gasohol containing ethanol produced by the plaintiff received the full 25¢ a gallon credit available to retailers on spot sales in Ohio during January and February of 1985 (Tr. 19). Prior to January 1, 1985 the credit available to dealers of gasohol containing ethanol was 35¢ per

gallon (Tr. 19). The credit applicable to dealers of gasohol containing ethanol produced by the plaintiff is recalculated monthly by the Ohio Department of Taxation (Tr. 24). During the month of March the credit was 24¢ per gallon. By July 1, 1985 R.C. § 5735.145(B) is fully applicable to all sales of ethanol by the plaintiff including both spot sales and contract sales (Tr. 23-24). After July 1, 1985 Ohio dealers of gasohol containing ethanol produced by the plaintiff will not receive any credit while retailers selling gasohol blended with non-Indiana ethanol will continue to receive 25¢ per gallon credit (Tr. 23). (Plaintiff's Exs. 7).

17. New Energy and South Point compete for the sale of ethanol to Ohio dealers with Archer Daniels Midland ("ADM"), Pekin Energy ("Pekin") and A. E. Staley ("Staley"). ADM and Pekin have production facilities in Illinois; Staley had production facilities in Tennessee. Ethanol produced in these facilities is entitled to the full Ohio credit. Additionally, ADM, Pekin and Staley have the capacity to supply the portion of the Ohio market for ethanol presently being filled by the plaintiff.

18. The evidence showed that the decreased credits afforded to retailers of blended gasoline containing plaintiff's product for January and February of 1985 decreased the price paid to plaintiff for its product (Tr. 27). (Plaintiff's Ex. 6) The decreased credits will continue to affect the price paid to plaintiff for its product through July 1, 1985. After July 1, 1985, the plaintiff believes that the application of R.C. § 5735.145(B) will affect the price paid to plaintiff for its product to the extent that the plaintiff will be unable to sell its ethanol in Ohio (Tr. 23).

19. The amount of state tax credit available to dealers of ethanol on a gallon of ethanol directly affects the per gallon price that dealers pay to ethanol producers in that the lower the available credit, the lower the price paid to ethanol producers for a gallon of ethanol (Tr. 28-29).

20. The continued enforcement of R.C. § 5735.145(B) will cause financial hardship to plaintiff.

By Agreement:

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/s/ by John K. Lines
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IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

NEW ENERGY COMPANY OF)	
INDIANA,)	
)	
Plaintiff,)	
	)	Case No.
v.	)	85CV-02-712
)	
	)	Judge Crawford
JOANNE LIMBACH,)	
TAX COMMISSIONER, et al.,)	
)	
Defendants.))	

NEW ENERGY COMPANY OF INDIANA'S
POST-TRIAL ADDITIONAL PROPOSED
FINDINGS OF FACT
AND CONCLUSIONS OF LAW

(Filed April 5, 1985)

Pursuant to the Court's instructions, the parties filed Agreed Findings of Fact. The plaintiff submits the following additional findings of fact which are supported by the record for review and inclusion into the Court's findings but to which the parties could not agree. The new language in prior findings is underlined.

ADDITIONAL PROPOSED FINDINGS OF FACT

11. Various governmental bodies have initiated programs to encourage the *production and use* of ethanol (Tr. # 1, at 9). The United States Department of Energy provides loan guarantees and feasibility study grants to develop the technology to *produce* ethanol more efficiently (Tr. # 1, at 9). To encourage the *production and use* of ethanol, the Department of Treasury exempts

ethanol/gasoline blends from 6¢ of the 9¢ federal excise tax on gasoline (Tr. # 1, at 9-10). In addition, at least 32 states encourage the *production and use* of ethanol by allowing a credit from their respective motor fuel taxes for ethanol/gasoline blends (Tr. # 1, at 10). The provision of tax credits has been the best method adopted by the federal and state governments to encourage the *production and use* of ethanol.

20. The continued enforcement of R.C. § 5735.145(B) will cause *severe* financial hardship to plaintiff and threaten plaintiff's continued viability (Tr. # 1, at 44).

21. Representatives of South Point lobbied the Ohio General Assembly to enact the reciprocity provision provided for in R.C. § 5735.145(B) for the stated purpose of providing an incentive to other states to pass similar legislation (Tr. # 2, at 57 and 60).

22. Intervenor raised the issue of necessary filings with the Secretary of State by the plaintiff and New Energy Corporation of Indiana, the general partner of the plaintiff. Although Ohio R.C. § 1782.49 was not effective until at least April 1, 1985, if after a review of the legal authorities cited by intervenor, plaintiff believes that the subsequent filings made by it are relevant, additional findings of fact concerning these filings (of which the Court may take judicial notice), will be presented along with the Reply Brief:

CONCLUSIONS OF LAW

Conclusion # 1: Plaintiff, New Energy Company, has standing to come before this Court and challenge the validity of R.C. § 5735.145(B) under the United States Constitution.

Authorities in Support of Conclusion # 1

Even though New Energy Company of Indiana ("New Energy Company") is not a "taxpayer under R.C. 5735.145 it nevertheless has standing to challenge the reciprocity legislation because it has suffered injury in fact and is a person whose rights are affected by the newly enacted legislation. In *Miller v. Publicker Industries, Inc.*, No. 65,839, slip op., (Sup. Ct. Fla. Oct. 11, 1984), the Supreme Court of Florida held that a person need not be a "taxpayer" to challenge the constitutionality of a tax statute. The Court stated that:

A party may challenge the constitutionality of a statute after showing that enforcement of the statute will injuriously affect the plaintiff's personal property rights In the present case Publicker presented evidence that, due to removal of the exemption on gasohol with foreign source alcohol, blender/distributors of gasohol in Florida either will not purchase or will require a substantial reduction in price before purchasing foreign ethyl alcohol. Publicker demonstrated the devastating effect this statute has had on its business. It must continue to pay fixed expenses while unable to sell its alcohol in Florida at an economically viable price. *The legislature may not protect a tax statute from constitutional review merely by ensuring that someone other than the party whose business is adversely affected must pay the tax* We therefore agree with the trial court's

finding that Publicker had standing to challenge [the statute]

[*Miller v. Publicker Industries, Inc.* No. 65,839 (Sup. Ct. Fla. Oct. 11, 1984) (emphasis added).]

Similarly, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. —, 82 L.Ed. 2d 200, 104 S. Ct. 3049 (1984) and *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 50 L.Ed. 2d 514 (1977) resolve any doubt about standing. In *Bacchus Imports, Ltd.*, the United States Supreme Court stated that:

The State presents a claim not made below that the wholesalers have no standing to challenge the tax because they have shown no economic injury from the claimed discriminatory tax. The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the state whether or not their customers pay their bills. Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and *the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. The wholesalers plainly have standing to challenge the tax in this Court.*

[82 L.Ed. 2d 206-207 (emphasis added).]

Likewise, in *Boston Stock Exchange*, the third footnote indicates the United States Supreme Court's response to the lack of standing argument raised by the New York State Tax Commissioner:

We also agree that the Exchanges have standing under the two-part test of *Data Processing Service v.*

Camp, 397 U.S. 150, 25 L.Ed. 2d 184, 90 S. Ct. 827 (1970). Appellants' complaint alleged that a substantial portion of the transactions on their exchanges involved securities that are subject to the New York transfer tax, and that the higher tax on out-of-state sales of such securities diverted business from their facilities to exchanges in New York. [citation omitted] The allegation establishes that the statute has caused them "injury in fact," and that a case or controversy exists.

[50 L.Ed. 2d 514
519.]

Conclusion # 2 This Court has jurisdiction to declare tax statutes unconstitutional as being violative of the United States and Ohio Constitutions.

Authorities in Support of Conclusion # 2

Ohio Law is settled that Ohio courts are fully authorized to grant a judgment declaring a tax statute unconstitutional. R.C. § 2721.03 provides as follows:

Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in § 119.01 of the Revised Code, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under such instrument, constitutional provision, statute, rule, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

[Emphasis added.]

In *Fraternal Order of Police v. D'Amico*, 4 Ohio App. 3d 15 (1982), the Court of Appeals for Cuyahoga County

took the opportunity to interpret R.C. § 2721.03. In *Fraternal Order of Police*, the plaintiffs, as members of unions representing police and fire department employees, brought a declaratory judgment action to contest the validity of a municipal ordinance which set forth guidelines and directives for the use of sick leave benefits for city employees. The defendants argued that the Court of Common Pleas lacked jurisdiction because the complaint merely alleged that the plaintiffs would be affected in some "future abstract manner" and, therefore, the plaintiffs failed to invoke the Court's jurisdiction over an actual case or controversy.

The Court of Appeals, in finding that the complaint successfully invoked the Court of Common Pleas' jurisdiction, stated that:

... R.C. § 2721.03 allows for such a suit to determine the validity of a municipal ordinance . . . [s]ince appellee's rights are "affected" by a municipal ordinance, they may have the validity of such ordinance determined. Therefore, appellees successfully invoked the court's jurisdiction . . .

[4 Ohio App. 3d 15, 16]

Conclusion # 3 This Court is fully authorized to enjoin the enforcement of the provisions of R.C. § 5735.145(B).

Authorities in Support of Conclusion # 3

This conclusion of law is fully supported by plaintiff's *Post-Hearing Memorandum In Support Of Jurisdiction To Issue A Preliminary Injunction* filed with this Court.

Conclusion # 4 R.C. § 5735.145(B) creates an impermissible burden upon interstate commerce in violation of the Commerce Clause of

the United States Constitution (Art. I, § 8, cl. 3.).

Authorities in Support of Conclusion # 4

This conclusion of law is fully supported by the authorities cited on pages 1-15 of plaintiff's *Hearing Memorandum In Support Of Preliminary Injunction* filed with this Court.

Additional Ohio Authorities in Support of Conclusion # 4

Several Ohio Supreme Court cases have been instructive on the issue of tax statutes placing a burden on interstate commerce. In *Dayton Power & Light Co. v. Lindley*, 58 Ohio St. 2d 465 (1979) the plaintiff challenged the constitutionality of an Ohio coal consumption tax by asserting that it imposed a discriminatory tax on interstate commerce and impermissibly burdened commerce in violation of the Commerce Clause.

The plaintiff purchased coal for its Ohio generating plants from Ohio, Kentucky, and West Virginia and argued that the tax rate structures of the Ohio coal use tax encouraged the purchase of Ohio high sulphur coal and discouraged the purchase of out-of-state low sulphur coal. The Ohio Supreme Court, in holding that the tax statute violated the Commerce Clause of the United States Constitution, stated that:

The judiciary is not concerned with a legislative purpose that encourages "intrastate commerce and industry" or foster's interstate competition. It is only when the means by which that legitimate purpose is to be accomplished flies in the face of the United States Constitution that the judicial branch must become involved:

"Our decision today does not prevent the states from structuring their tax system to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition, no State may discriminatorily tax a product manufactured or the business operations performed in any other State." For this court to place a judicial stamp of approval on the statutory scheme of taxation now before us would be to shrink our sworn duty, as members of the judicial branch of government, to support the Constitution of the United States.

[58 Ohio St. 2d 465,
477 (citation omitted).]

Similarly, in *American Modulars Corp. v. Lindley*, 54 Ohio St. 2d 273 (1978), the Ohio Supreme Court struck down an Ohio use tax that assessed a tax on the plaintiff's use of tangible personal property purchased outside the State of Ohio but did not similarly tax tangible personal property purchased in the state. In holding that the use tax violated the Commerce Clause of the United States Constitution, the Ohio Supreme Court stated that:

Because goods used in taxing counties and purchased in non-taxing Ohio counties are not subject to a four and one-half (4½%) percent tax even though identically used goods purchased out-of-state are so taxed, R.C. § 5741.021 provides a direct commercial advantage to local purchases which impedes the free flow of trade between the states. . . . Indeed, R.C. § 5741.021 discriminates against out-of-state acquisitions as invidiously as it would if it subjected those purchases to unfavorable tax basis . . . or if there were no county sales tax at all. . . . Finally, the fact that R.C. § 5741.021 discriminates against interstate com-

merce only in its practical effect does not bar a finding that it is unconstitutional. . . . We, therefore, hold that R.C. § 5741.021 is unconstitutional insofar as its application imposes a higher tax rate on property purchased out-of-state and used in a taxing county that on similarly used property purchased in the state.

[54 Ohio St. 2d 273,
278 (citations omitted).]

Conclusion #5 The Reciprocity Provisions in R.C. § 5735.145(B) are unconstitutional on their face.

Authorities in Support of Conclusion #5

This conclusion of law is fully supported by the authorities cited on pages 15-17 of plaintiff's *Hearing Memorandum In Support Of Preliminary Injunction* filed with this Court.

Conclusion #6 Ohio R.C. § 5735.145(B) violates the United States Constitution by denying plaintiff equal protection of the law.

Authorities in Support of Conclusion #6

This conclusion is fully supported by the authorities cited on page 19 of plaintiff's *Hearing Memorandum In Support of Preliminary Injunction* filed with this Court.

Additional Authority in Support of Conclusion #6

In a more recent decision, the United States Supreme Court struck down an Alabama domestic preference tax statute as violative of the equal protection clause. In *Metropolitan Life Insurance Co. v. Ward*, U.S. Sup. Ct. No. 83-1274 (March 26, 1985), an Alabama domestic preference tax statute imposed a substantially lower gross premium

tax rate on domestic insurance companies than on out-of-state insurance companies. In finding that the promotion of domestic business within a state, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose, the Court stated that:

The effect of the statute as issue here is to place a discriminatory tax burden on foreign insurers who desire to do business within the State, thereby also incidentally placing a burden on interstate commerce. Equal protection restraints are applicable even though the effect of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned . . . In whatever light the state's position is cast, acceptance of its contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory tax would stand or fall depending primarily on how a State framed its purpose—as benefitting one group or as harming another. This is a distinction without a difference, and one that we rejected last term in an analogous context arising under the Commerce Clause. *Bacchus Imports, Ltd. v. Diaz*, 468 U.S., at — . . . We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.

[*Metropolitan Life Insurance Co. v. Ward*, No. 83-1274 slip. op. at 11-12 (March 26, 1985) (citation omitted).]

Conclusion #7 Ohio R.C. § 5735.145(B) violates the Constitution of the United States by granting Ohio ethanol producers special privileges and immunities contrary to Art. IV, § 2, cl. 1.

Authorities in Support of Conclusion #7

This conclusion is fully supported by the authorities cited on pages 17-18 of plaintiff's *Hearing Memorandum In Support Of Preliminary Injunction* filed with this Court.

Conclusion #8 R.C. § 5735.145(B) is severable from the remaining provisions of R.C. § 5735.

Authorities in Support of Conclusion #8

Plaintiff challenges only that portion of R.C. § 5735 that burdens interstate commerce with the reciprocity requirement. R.C. § 5735.145(B) is clearly severable. R.C. § 1.50 states that:

If any provisions of a section of the revised code were the application thereof to any person or circumstances held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, into this end, provisions are severable.

The Miami County Court of Appeals specifically addressed the severability issue in *Livingston v. Clawson*, 2 Ohio App. 3d 173 (1982). The concluding paragraph in *Livingston* presents the proper interpretation of R.C. § 1.50.

While R.C. 1.47 indicates a presumption that an entire statute is intended to be effective, the legislature clearly, in R.C. 1.50 provided for the event their legisla-

tion might be determined by courts to be partially invalid or unconstitutional. It was the legislature's clear intent that other provisions of legislation not determined to be invalid be given effect where just and reasonable result capable of execution can be effectuated. Sections 1, 2, and 4 of Am. Sub. H. B. No. 1122 can be so effectuated and we find the trial court properly ruled the appellees are entitled to be compensated consistent with the provisions of that legislation.

[2 Ohio App. 3d 173, 178].

Respectfully submitted

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ATTACHMENT A

(A) Ohio Revised Code § 5735.145(B)

The qualified fuel otherwise eligible for the qualified fuel credit shall not contain ethanol produced outside Ohio unless the tax commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing ethanol produced in Ohio; provided however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio.

(B) Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3).

The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

(C) Equal Protection Clause

(1) United States Constitution (Amendment 14, § 1).

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) Ohio Constitution (Art. I, § 2).

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it neces-

sary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

(D) Privileges and Immunities Clause

(1) United States Constitution (Art. IV, § 2, cl. 1).

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

NEW ENERGY COMPANY)	
OF INDIANA,)	
)	
	)	Plaintiff,
vs.	)	Case No.
	)	85CV-02-712
)	
JOANNE LIMBACH,	)	Judge Crawford
TAX COMMISSIONER, <i>et al.</i> ,)	
)	
Defendants.)	

PROPOSED ADDITIONAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF DEFENDANTS
JOANNE LIMBACH, TAX COMMISSIONER OF OHIO,
AND MARY ELLEN WITHROW, TREASURER
OF OHIO

(Filed April 10, 1985)

FINDINGS OF FACT

1. It is conceivable that the Ohio General Assembly may have had several purposes in enacting R.C. 5735.145 (B), none of which were explicitly declared in the enactment itself. One of these purposes was to provide a cleaner and safer environment for Ohio citizens by encouraging the use of ethanol as a replacement for lead in gasoline not only in Ohio but in all states.

CONCLUSIONS OF LAW

1. Plaintiff cannot maintain this action under R.S. 2723.01 because only taxpayers can maintain such an action and plaintiff is not a taxpayer with respect to the Ohio Motor Vehicle Fuel Tax.

2. This Court is without authority to grant the injunctive relief requested by plaintiff.

3. As a regularly enacted statute, R.C. 5735.145(B) is entitled to a strong presumption of constitutionality which may be overcome only by a showing that it is clearly unconstitutional beyond a reasonable doubt. Plaintiff had the burden of establishing that this provision was in undoubted violation of some state or federal constitutional provision.

4. Plaintiff has failed to meet its burden of establishing that R.C. 5735.145(B) is clearly unconstitutional beyond a reasonable doubt. Therefore, that provision must be upheld.

5. R.C. 5735.145(B) has neither a discriminatory purpose nor a discriminatory effect on interstate commerce. Therefore, it is valid under the Commerce Clause.

6. The purpose of R.C. 5735.145(B) is to provide a cleaner and safer environment for citizens of Ohio, which purpose is a legitimate state purpose and is advanced by the reciprocity provision which encourages the use of ethanol as a substitute for lead in gasoline.

7. The incidental effect, if any, that R.C. 5735.145(B) has on interstate commerce is easily outweighed by the benefits to the health and safety of the citizens of Ohio that will result from enforcement of the statute. Therefore, because the effects of R.C. 5735.145(B) on interstate commerce are not excessive in relation to the local benefits, it must be upheld.

8. The Privileges and Immunities Clause affords protection only to natural persons. A partnership is not a

natural person, particularly when the sole partner is a corporation. Because plaintiff is a partnership it is not protected by the Privileges and Immunities Clause. Therefore, R.C. 5735.145(B) must be upheld against plaintiff's Privileges and Immunities challenge.

9. Even if plaintiff was within the class protected by the Privileges and Immunities Clause, R.C. 5735.145(B) is not in violation of that provision because it does not constitute an intentional discrimination operating to the disadvantage of all nonresidents and favoring all residents.

10. R.C. 5735.145(B) is rationally related to the legitimate state purpose of providing a cleaner and safer environment and therefore does not violate the Equal Protection Clause of either the United States or the Ohio Constitution.

Respectfully submitted,

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ATTORNEYS FOR JOANNE LIMBACH,
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TREASURER OF STATE

(Certificate of Service Omitted)

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

NEW ENERGY COMPANY)	
OF INDIANA,)	
)	
PLAINTIFF,	)	CASE NO.
	)	85CV-02-712
VS.)	
	)	JUDGE
JOANNE LIMBACH	)	CRAWFORD
TAX COMMISSIONER, et. al.,)	
)	
DEFENDANTS.)	

JUDGMENT ENTRY

Judgment is hereby rendered in favor of the Defendants in accordance with this Court's Decision of April 23, 1985.

The Court finds that *Revised Code* Section 5735.145 does not violate the Privileges and Immunities, the Equal Protection or the Commerce Clauses of the United States Constitution. Case Dismissed.

Costs to Plaintiff.

DATE: _____

/s/ DALE A. CRAWFORD, JUDGE

APPROVED:

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Attorney for Plaintiff

Richard C. Farrin, Esq.
Attorney General's Office
Attorney for Joanne Limbach
and Mary Ellen Withrow

David C. Crago, Esq.
Attorney for South Point Ethanol

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

New Energy Company of Indiana,)	
)	
Plaintiff-Appellant,	)	85 CV 02-712
)	
v.	)	No. 85 AP-340
	)	(REGULAR
Joanne Limbach, et al.,	)	CALENDAR)
)	
Defendants-Appellees.)	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on May 8, 1986, the assignments of error are overruled, and defendant South Point's cross-assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE and McCORMAC, JJ.

/s/ By Judge Alba L. Whiteside

cc: David J. Young,
Kevin R. McDermott and
John K. Lines
Herman Schwartz
Richard C. Farrin
David C. Crago,
James R. King and
Gail E. Griffith

THE SUPREME COURT OF OHIO
COLUMBUS

New Energy Company of Indiana,)	
	)	1986 TERM
Appellant,	)	To Wit:
	)	December 26, 1986
v.	)	Case No. 86-784
)	
Joanne Limbach, Tax	)	JUDGMENT
Commissioner, et al.,	)	ENTRY
	)	APPEAL FROM
Appellees.	)	THE COURT
	)	OF APPEALS

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. Upon consideration thereof, judgment of the Court of Appeals is reversed consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellees its costs herein expended; and that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Franklin County for entry.

/s/ Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

FOR YOUR INFORMATION ONLY
NOT FOR FILING

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed the seal of said
Supreme Court, on this date _____.

JAMES WM. KELLY, CLERK
/s/ Daniel J. Crowley, Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

New Energy Company of Indiana,)	
	)	1987 TERM
Appellant,	)	To wit:
	)	January 21, 1987
v.	)	Case No. 86-784
	)	REHEARING
Joanne Limbach, Tax	)	ENTRY
Commissioner, et al.,	)	(Franklin
	)	County)
Appellees.)	

It is ordered by the Court that rehearing in this case
be, and the same is hereby, granted.

/s/ Thomas J. Moyer
Chief Justice

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

I, Robert L. Edington, Acting Clerk of the Supreme
Court of Ohio, do hereby certify that the foregoing order
was correctly copied from the records of said Court, to
wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto sub-
scribed my name and affixed the seal of said Supreme
Court, on this 21st day of January, 1987.

Robert L. Edington Acting Clerk
/s/ J. A. Redd Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

New Energy Company of)	
Indiana,)	
	)	1987 TERM
Appellant,)	
	)	To wit:
v.	)	February 25, 1987
)	
Joanne Limbach, Tax	)	Case No. 86-784
Commissioner, et al.,)	
	)	ENTRY
Appellees.)	

This cause is here on appeal from the Court of Ap-
peals for Franklin County. The Court, having granted a
rehearing of this cause, now comes to consider additional
matters filed herein. Upon consideration of the appel-
lant's motion for a supersedeas bond or injunction relief
or, in the alternative, for correction of the Announcement
List dated January 28, 1987, or, in the alternative, for
acceleration of reconsideration proceedings,

IT IS ORDERED by the Court that said request for
bond or injunctive relief be, and the same is hereby, de-
nied; and that said request for correction of the Announce-
ment List be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that said
request for acceleration of reconsideration proceedings be,
and the same is hereby, granted.

IT IS FURTHER ORDERED by the Court that appellant shall file its merit brief 5 days after the receipt of this order, that appellees shall file their merit brief 5 days after the appellant files its merit brief and that appellant shall file its reply brief 5 days after appellees file their merit brief.

IT IS FURTHER ORDERED by the Court, *sua sponte*, that the opinion announced in this cause on December 26, 1986, is hereby vacated and set aside and that publication thereof is withheld from the Ohio Official Reports Advance Sheets pending further proceedings in this Court.

/s/ Thomas J. Moyer
Chief Justice

I, Robert L. Edington, Acting Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of February, 1987.

Robert L. Edington Acting Clerk
/s/ J. A. Redd Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

New Energy Co. of Indiana,)	
	)	1987 TERM
Appellant,)	
	)	To wit:
v.	)	March 25, 1987
)	
Joanne Limbach, Tax Commr.,	)	Case No. 86-784
et al.,)	
	)	E N T R Y
Appellees.)	

This cause is pending before the Court for further consideration of the appeal from the Court of Appeals for Franklin County and upon consideration of the appellant's motion for *nunc pro tunc* order,

IT IS ORDERED by the Court that said motion be, and the same is hereby, denied.

/s/ Thomas J. Moyer
Chief Justice

I, Robert L. Edington, Acting Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of March, 1987.

Robert L. Edington Acting Clerk
/s/ J. A. Redd Deputy

TRANSCRIPT OF PROCEEDINGS

March 1, 1985

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(p. 3) BARRY DIRENFELD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Young:

Q. State your name.

A. Barry Direnfeld (spelling) D-i-r-e-n-f-e-l-d.

Q. And what is your address, sir?

A. 2500 North 24th Street, Arlington, Virginia.

Q. By whom are you employed?

A. New Energy Company of Indiana.

Q. In what capacity?

A. I am the president, chief executive officer.

Q. How long have you been so employed?

A. A little bit more than five years.

Q. Would you give us an abbreviated—because time is of the essence—resume of your educational background?

(p. 4) A. Yes. I received a BA degree from Kenyon College, 1971; I'm a graduate of Catholic University of American Law School, 1975.

I was admitted to the Ohio and District of Columbia Bar Associations.

I have served as an attorney for a law firm in Washington: Akin, Gump, Strauss, Hauer and Feld.

Prior to that I served as a chief counsel and staff director of the United States Judiciary Subcommittee on Antitrust Monopoly.

I have been a resident teaching fellow at Harvard University in [sic].

I have been chief legislative counsel for Howard Metzenbaum and served as legislative counsel to Richard Stone.

Q. Could you tell me what function your business is in?

A. We are in the business of producing ethanol for fuel purposes.

Q. Can you give me a brief description of how the ethanol was used that you produced?

A. Ethanol is used as an octane enhancer to be blended in a 90/10 ratio with gasoline. It was originally used to extend gasoline supplies in the late 1970's and early 1980s during our embargoes and can be used again (p. 5) during a crisis. It is a lead-free additive to replace lead in gasoline to increase the performance of automobiles.

Q. Where is your plant or your production plant located?

A. It is located in South Bend, Indiana.

Q. Is the location a crucial subject with respect to ethanol production plants?

A. Absolutely. The primary feed stock or the components of the produce is corn, so you will want to be located near corn.

The primary product is a petroleum substitute or petroleum additive so you want to be near petroleum refineries and markets where gasoline is consumed, and in addition to that, you want to be in a state that has supported the development of the market for ethanol as well as skilled labor available for industrial development generally.

Q. How long has your company been in existence and what is the present state of operation, if you are not at present stage of capacity?

A. New Energy Company of Indiana is a public limited partnership. It was formed in 1980 and fully capitalized in 1982 by virtue of a public offering. The capital, equity capital of New Energy is \$40,000,000. The (p. 6) equity investors have also guaranteed, either through cash or personal guarantees, another \$20,000,000 of the loans to the partnership.

We commenced construction of the facility in 1982. We placed the produce in service in October of 1984. We are currently in our start-up phase of operation and we are moving toward full capacity. We are probably producing today at the level of 75 to 80 percent of capacity.

Q. What would that be per month? How many gallons per month?

A. We are at the rate right now of three, three-and-a-half million gallons a month of capacity. Our maximum or full capacity is 4.7 million gallons per month.

Q. So you will, when you reach full capacity, gain additional markets?

A. Yes. We have had as a start-up company or as a start-up plant, we had to go from little marketing and bring it up in large increments, the first one or two million came slowly, and once you've made your modifications you'll increase production at very substantial rates, so we will have to continue to expand our market rapidly.

Q. I believe you testified earlier, Mr. Dierenfeld, that you obtained capitalization through equity capital of \$40,000,000, and the investors guaranteed an additional \$20,000,000 in debt. Was that the extent for debts for (p. 7) capitalization of this project?

A. No. The total project cost was in the neighborhood of in excess of \$185,000,000. The principal loan to the project is a loan of \$140,914,000. And that loan was made by a syndicate of banks led by the First National Bank of Chicago. 90 percent of the principal and interest of that loan was guaranteed by the United States Department of Energy pursuant to the Energy Security Act of 1980.

In addition to that, the project has received a direct loan from the Department of Energy in the amount of \$1,769,000.

Finally, the partnership has a loan to the South Bend Development Corporation to repay certain funds that the City of South Bend received from the Urban Development Action Grant provided it by the United States Department of Housing and Urban Development.

Q. Could you explain for the court why, to the extent you know, the United States Government and the Depart-

ment of Energy has made this sort of a commitment to the ethanol plant that you operate?

. . .

(p. 8) Q. Instead of saying what the congressional intent was, I want your knowledge of the items of potential interest that justifies the enactment.

A. There are several items of interest that led to the development of this project, in my judgment. First, the production of ethanol is a renewable fuel because it comes from the production of corn and in corn, of course, that is renewed each year so the producing of liquid fuel from a renewable source creates a source of energy independent for our country.

The Energy Security Act of 1980 was passed to increase our country's independence from foreign oil of petroleum. It also targets ethanol because, in fact, it was able to reduce our agriculture surpluses by creating a very large domestic market for agriculture.

Today, for instance, over 2,000,000 bushels of corn are consumed from the production of ethanol and the (p. 9) program is only four or five months old. This market of 2,000,000 bushels approximates the amount we sell to the Soviet Union so you can see this has had a very significant impact on surpluses.

United States Department of Agriculture recently estimated that this increase demand has increased by 14 cents a bushel the value of our corn crops, which would translate into approximately a billion dollar increase in the real value of our corn, so that's a very real reason why

they chose ethanol to do that, and also because it provided an alternative to lead in gasoline.

Ethanol is the most environmentally benign substitute for lead and the policy of the environmental protection agency was to accelerate for health reasons the removal of lead from gasoline, and this also provided an alternative so we could, in fact, have the octane necessary to run our cars and still have the health benefits of ethanol.

For those reasons, the federal government created a number of programs designed to promote the development of ethanol. One is the Energy Security Act which provided loan guarantees, feasibility study grants to develop the technology to produce more efficiently ethanol as well as the tax—I'm not sure of the tax provision exactly in citing it; however, it provided an exemption for ethanol (p. 10) gasoline blends for the payment of the six cents out of the nine cents for the federal excise tax on gasoline.

Q. In addition to the federal credit that you have spoken of, do you find that many states have also enacted credit legislation in order to foster the production of ethanol?

A. Yes, currently 32 states have enacted credits to promote the development and sale of ethanol blends in their states.

Q. Now, in order to have the record clear on this, what is the current federal credit grant by the federal government for consumption of ethanol?

A. It exempts ethanol-alcohol blends which are in the 90/10 percent ratio, from six cents of the nine cents

excise tax on gas. It provides a six cents per gallon blender tax credit to blenders of alcohol who don't want to blend 90/10 percent. So the value is 60 cents a gallon.

* * *

(p. 11) The Witness: A gallon of ethanol, in order to be sold as motor fuel, cannot exceed 10 percent of the blend. You sell 90 percent gas and 10 percent ethanol so the gallon of this blend would only have a tenth of a gallon of ethanol in it. That blend is exempt from six cents of the tax, so in order to find out the exact value of a gallon of ethanol, it would be times 10 so you get to 60 cents so the value of the credit to a gallon of ethanol is 60 cents; the value to the blend is six cents. It is very confusing.

Q. That's because a gallon of ethanol would be split, in effect, over 10 gallons of blended gas?

A. That's right, that's right. There would be 10 gallons of blended gas for every one gallon of ethanol.

Q. So you are multiplying the six by 10?

A. That's correct.

Q. Let me, if I might, show you two documents. First of all, plaintiff's exhibit no. 1 and plaintiff's exhibit no. 2, and I have already shown those to counsel, and would you tell us what plaintiff's exhibit 1 is, sir?

A. It is an aerial view of New Energy production fuel facility in West Bend and it was taken prior to our plant dedication on October 24th, 1984. You can see most of the heart of the production facility.

Q. Let me hand you that which has been previously (p. 12) marked as plaintiff's exhibit 2 and ask you to identify that, if you would.

A. This is an identity brochure that New Energy uses in conjunction with marketing to both identify the use of ethanol as well as to establish new energy's position in the marketplace.

Q. Let me cover one other point and then we will move back and get a brief description of how ethanol is produced.

You have described for us the amount of the federal tax credit with respect to this production process and you have also listed from your personal knowledge some potential knowledge of federal interest in the production.

Are you able to tell us the cost to the federal government of granting these credits for ethanol production?

A. Last year at the request of congress, they asked the very same question of the general accounting office which is the accounting agency that congress uses to evaluate macro economic effects of certain laws. The conclusion came back from the general accounting offices that because of the significant demand increase of corn by ethanol, it reduced government outlays in the agriculture budgets by reducing payments to farmers to not grow crops (p. 13) or pay for government storage. In addition to that, what it did was increase dramatically the balance of the nature of our payments by backing out imported foreign crude oil.

An example of today's production of roughly 500,000,000 gallons would be roughly equivalent to 12,000,000 gal-

lons of crude oil. That would approximate \$300,000,000 enhancement of our balance of payments, so what they came back with was the forgo revenues by virtue of the excise tax exemption were more or less offset and they said there was no material cost to the government and recommended the continuation of the program through 1992.

Q. What I would like you to do at this time, if you would, Mr. Direnfeld, is give us an abbreviated description of how ethanol is produced.

A. It is built off the traditional art of making moonshine whiskey and takes corn in our process and grinds up corn. We use 20,000,000 bushels of corn a year at New Energy at full production. A bushel of corn makes two-and-a-half gallons of ethanol.

We also gather the animal feed. It is sold as a high protein animal feed, particularly to dairy animals. We will produce 185 tons of animal feed.

In addition to that the process also creates (p. 14) carbon dioxide and we will recover our carbon dioxide and sell it to a production who's building a facility for processing foods and carbonated beverages. It is treated with enzymes to turn the starch in corn to sugar and there yeast is taken and cooked and converted into alcohol. The alcohol is stripped off, the animal feed is dried and this is how we produce alcohol.

You can see in the back there is a little utility company there with a coal pile.

Q. What proof of alcohol do you produce?

A. Just under 200, it is 199 plus.

. . .

Q. Would you briefly describe for the court the nature of your market; that is, perhaps the state in which you market your product and the identities of the types of (p. 15) consumers with whom you do business?

A. Our primary market to date consists of three states; the state of Indiana, Ohio, and Illinois. The reason for those markets are several.

First, because alcohol cannot, ethanol cannot be transported by pipeline. It has a very high cost of transportation so the reasonable cost is paramount to establishing the market.

Second, the availability of an acceptance in market place for ethanol is important and that's been stipulated in all three states by state incentive which has made it attractive for customers such as retailers, people who essentially are retailers of petroleum products or any users who will be mostly independent oil companies, to buy and blend the ethanol and sell it at their gasoline stations.

Q. What percentage then of these three states—what percentage are you now selling to Ohio consumers and then tell me what the percentage would be at full production according to your schedules.

A. I think today I would have to look at it, but it is in the neighborhood of 20 to 25 percent in Ohio. We are forecasting to go to 35 percent, which would equate to a million seven. 1,700,000 gallons per month in Ohio.

Q. How many gallons per month are you distributing (p. 16) in Ohio at the present time?

A. I would have to defer to Bob. I think probably in excess of a 1,000,000 gallons a month.

Q. Do you have contractual commitment consumers and spot sales?

A. We have a mixture of both. We have approximately 60 percent of our sales that are contracted, 60-65 percent and then 35 percent would be spot. In terms of long term contract, we have one long term contract which runs through the end of 1985, and that provides for a 1,000,000 gallon commitment and that happens to be to a customer in Ohio.

Q. 1,000,000 gallons a month?

A. That's right.

Q. And that runs through the end of '85?

A. That's correct.

Q. Now we have talked about its uses and production process: Can you tell us what's more expensive to produce a gallon of, regular gasoline or a gallon of ethanol blend?

A. Unfortunately a gallon of ethanol is far more costly than a gallon of gasoline at this time.

Q. We will get into that in a moment, but approximately what would be the two figures of the cost to produce a regular gallon of gas and the cost to produce (p. 17) a gallon of ethanol?

A. I think today a wholesale price of a gallon of gasoline would approximate 73 cents and our cost of producing ethanol is \$1.38, so the difference would be 60—

Q. With this difference in cost then, would you explain to the court how you would remain competitive and induce a consumer to purchase ethanol or ethanol blends rather than regular gasoline?

A. The only way we can currently do so is through the state and federal incentives or credits that exist, and absent those credits and ethanol would not be a viable factor in the market place today.

Q. If you could, give us a bird's eye view of the history of the marketing of ethanol as to when it first took place and what kind of volumes we are talking about there, and what volumes we have reached today in the nation.

Q. That's rather phenomenal actually. In 1980 approximately 50,000,000 gallons of ethanol was sold in the United States, which put ethanol blend at 10 times that or like 500,000,000 gallons. That's compared to 100,000,000 gallons of motor fuel, so it was virtually insignificant in the motor fuel mix as recently as 1980.

Since that time approximately—well industry estimates have it at about \$1,000,000,000 has been (p. 18) invested in capacity and consumption has gone up to approximately 500,000,000 of ethanol, which would put ethanol blend at 5,000,000,000—which is now approximately five percent of all gasoline in the United States has ethanol in it and that's over a period of five years.

Q. Let me ask you, and I will ask this question and see it if you can answer it with respect to both the federal tax credit and the Ohio tax credit that is granted for ethanol consumption.

Can you tell us who pays the tax and how?

A. Yes, it is paid as a deduction.

Mr. Farrin: I raise an objection here. Who pays the taxes determined by the specific statutes involved and I don't think it is proper for this witness to testify as to statutes that are clearly reviewable.

Mr. Young: I will reword the question, Mr. Farrin.

Q. Are you familiar with how the Ohio tax has been administered in the past?

A. Yes, I am.

Q. Are you familiar with how the credit, the ethanol credit is collected in Ohio?

A. Yes.

Q. I will ask you whether the motor fuel tax is paid by the employer or the gasoline station distributor.

(p. 19) A. It is paid by the distributor/retailer.

Q. When the retailer pays its motor fuel tax each month, is the credit that's available under the Ohio Ethanol Credit Legislation taken by that same retailer?

A. That's correct.

Q. Is it again the motor fuel tax?

A. That's correct.

Q. What is the amount of credit your retailers or were your retailers in Ohio receiving prior to the enactment of the legislation that is under challenge in this case, the ethanol provision credit of the legislation?

A. 35 cents per gallon.

Q. Okay. What is that general credit reduced to today?

A. 25 cents a gallon.

Q. Would you explain how that is reduced from 35 to 25?

A. The statute as I have read it—

Q. Don't interpret the statute, just give us your practical knowledge of what happened in the field.

A. The federal incentive, the federal credit on January 1, was increased from five cents a gallon to six cents a gallon and the Ohio statute reflected that increase and offset the Ohio credit to increase the credit from the (p. 20) federal government so it offset that 10 cent a gallon increase of the federal.

Q. So in other words, the seller of ethanol got the same credit before and afterwards, but afterwards the federal bore a greater portion?

A. That's right. It was just transferring a greater portion to the federal from the state.

Q. Let's first of all say prior to. Let's go back to the year 1984. Did Indiana have an ethanol credit incentive program?

A. Yes, commencing in 1977, the state of Indiana exempted all ethanol blends from its state sales tax on gasoline.

Q. A total exemption?

A. Yes, and that was in the amount of four percent.

Q. Okay. How many years did that remain in effect?

A. Until 1983 whereby it was reduced from four percent to three percent and scheduled to go back up to four percent on July 1 of 1984 so the effect was it was reduced by one percent for one year.

Q. The Ohio tax, according to your experience I believe as you have explained it, is based on a number of cents per gallon?

A. Yes, it is.

(p. 21) Q. Is the Indiana tax imposed similarly or does it have a different formula?

A. Because it is a percentage of the price of gasoline it floats with the price of gas. So if gasoline prices were to go down, the value as we have recently experienced, the value of the credit goes down with ethanol. I should note it is currently two-and-a-half percent.

Q. In Indiana?

A. That's right.

Q. Can you tell us which state has the highest percentage of gasoline sold as blended gasoline rather than regular?

A. It varies by which trade publication you look at but Indiana has been over 30 percent of all gasoline sold

in the state of Indiana, which has had it well, if not the highest, it has always been reported as one of the two highest for many years.

Q. Is there any state that all agree has laid out more in tax credit than any other state?

A. No, not in my judgment.

Q. Has there been a recent change in the Indiana law?

A. Yes, there has. Last year the Indiana exemption credit was reduced from the scheduled increase of four (p. 22) percent to two after Level C where it currently is, and is scheduled to be terminated on July 1 of '85; this year.

Q. What caused the termination of the Indiana tax credit?

A. Effective lobbying by a couple of major oil companies and the—

The Court: Let's not get into that.

A. — Well —

Q. Let's move on then.

As of July 1 of this year, the Indiana tax credit will phase out of existence?

A. That's correct.

Q. Does Indiana have a job grant program so if you locate your plant in certain areas you get certain grants?

A. They have a grant program for ethanol production provided it is located in a distressed area and has a certain number of jobs.

Q. Does that translate itself into an amount per gallon or could you do that as to what you're receiving for that in Indiana?

A. It is scheduled to be 15 cents a gallon; however, it is subject to an annual variation, so it is not preset funded.

Q. So as of July 1 of 1985, there will be no sales tax credit program in Indiana?

(p. 23) A. That's correct.

Q. With respect to the legislation that is challenged in this lawsuit, the Ohio reciprocal ethanol credit portion of the act, as a matter of law it is pointed out that it will no longer apply to out of state producers who do not have a tax credit in their state as of July 1, 1985. That's your understanding?

A. Yes.

Q. So if that law were to remain in effect, what impact would it have on your business as of that date?

A. We would, in my judgment, be insolvent. We would not be able to sell in Ohio. We are not aware of any other market of which we can sell that product so we would be unable to maintain or meet our financial obligations.

Q. Even prior to July 1 of 1985, is the Ohio Reciprocal Ethanol Credit Act having impact upon your business in Ohio right today?

A. Yes, very definitely. The law provides that for contract customers the reciprocity provision does not apply so for the amounts sold on the contract, the reciprocity

does not apply; however, to the spot sales the reciprocity would apply to out of state producers and did apply in the month of January where it was interpreted for a 30 day period of time, 31 days in January, the Ohio incentive would remain at 35 cents for those states that (p. 24) meet the reciprocity provision or those who had a contract, so therefore, any spot sales by someone who didn't meet the reciprocity; i.e. new energy, would have a 10 percent amount on the — do you understand?

The Court: Yes.

Q. To interrupt you so the record will be clear, you are saying the reciprocity provisions aren't going to apply to contract sales, you mean prior to July 1 of 1985?

A. Right. Afterwards it applies. After July 1. And would make it impossible to honor the contract.

Q. If the reciprocal ethanol credit is implemented between now and July 1 of 1985, will any of your purchasers be able to determine the price they are going to have to pay for ethanol?

A. No, because the Indiana subsidy is recalculated every month by the Ohio Tax Commissioners office and since it is evaluated on what the tax sales were several months before, because those are the only things to the Ohio department, we cannot tell somebody in the middle of the month what the subsidy will be calculated at in the next month. So there is a new entrance trying to gain market share. Once you just try to explain it, it sounds confusing. When you explain it to a retailer, we are running into a very chilling effect in terms of finding the market we need.

(p. 25) Q. Do you have any dispute with the tax department's interpretation of that law?

A. No, I think that it is a fair and correct reading of the statute.

The Court: At this point, let's take a 10 minute recess.

Recess taken.

BARRY DIRENFELD

Resuming the stand for further Direct Examination, having been previously sworn, continued his testimony as follows:

DIRECT EXAMINATION (Continued)

By Mr. Young:

Q. Mr. Direnfeld, I hand you what has been marked as plaintiff's exhibit 3 and plaintiff's exhibit 4, that have been provided to opposing counsel.

You testified earlier that you were in agreement with the positions taken by the tax commissioner with respect to this legislation. Are those letters to your company from the State of Ohio, Department of Taxation, describing how it will be implemented?

A. Yes, both of those letters are to our company articulating the interpretation. We find nothing incorrect with the state's interpretation.

(p. 26) Mr. Young: In order to demonstrate for the record the impact of the federal and state tax credits, I

have prepared some charts and we will have those marked. We will move to substitute reduced copies at the end of the proceeding.

Thereupon, the above mentioned charts were marked for the purpose of identification as plaintiff's exhibits 5, 6, and 7.

Q. I will hand you that which is marked plaintiff's exhibit 5, which has been shown to opposing counsel during the recess, and I would like you to explain that particular exhibit to the court and go through the mathematics, if you would.

A. Okay. (Indicating) What this chart shows is how ethanol is priced from New Energy's standpoint so you can see what the value of ethanol is and how we invoice it. Our cost of production is approximately net to the plant \$1.32 and that's roughly our break-even point at this moment. This will show you how, under our contracts and even on a spot basis these are the components you would use to price it on a contract. It is spelled out directly.

For example, there are three components: The (p. 27) price of gasoline, the value of the state credit, and the value of the federal credit that would determine the gross value of ethanol. So in fact, what would happen is today's price of gasoline is roughly 73 cents for wholesale.

To that you add 25 percent a gallon Ohio credit and the 60 cents a gallon federal credit to the equivalent price which is essentially \$1.58.

In order to induce a customer to use it, because they are handling the cost of putting in filters and tanks and refiller, you have to provide him a discount or increase his margin to use it. In this case it is 20 cents a gallon of ethanol. So you reduce the 1.58 and come up with a price of 1.38, and that's a delivered price of a purchase of a gallon of ethanol, and we would lay that in his terminal and we pay six cents a gallon to get it into Ohio from South Bend. So the net price we received for a gallon of ethanol sold in Ohio is \$1.32.

This today is providing us just enough revenue to cover revenue payments, it doesn't allow us anything for principal, so you see we are just in a break-even position and we will come back and talk about this number (indicating).

Q. One more thing. You started out with a net price for a gallon of regular gasoline. Is there some easy method to determine that?

(p. 28) A. In our contract we refer to the Oil Price Information Service, which is a weekly publication put out and its vernacular is OPUS [sic], and it lists every terminal in the United States that sells gasoline so either party can pick it up and look at what the average price is for that week, and from that you simply add the value and credits to get this number.

Q. I will now hand you, Mr. Drenfeld, plaintiff's exhibit 6 and I would like you to explain how the value of ethanol, as it's impacted by federal and state tax credits, provide incentive for customers and how the 90/10 blend program works.

A. The cost we had on the example is \$1.38 which is the price the customer pays to New Energy. In order to find out what his next cost is, you back off the value of the Ohio credit, subtract the value of the federal credit and you will get a net cost to the customer of 53 cents a gallon. That reflects that margin discount we talked about before.

Q. That's a gallon of pure ethanol?

A. Right. So this 53 cents is 20 cents a gallon less than the price of regular gasoline. Then in order to use that, the customer has to blend it in the 90/10 ratio that we talked about before so I illustrated how the retailer would do that.

(p. 29) What he would do is take the 53 cents ethanol from there and take 10 percent, so it is 5.3 cents per gallon.

Then take 90 percent of the price of a regular gallon of gasoline and that yields a price of 65.7 cents so when you add that together the cost of the blend is 71 cents or two cents less than a gallon of regular gasoline so this avoids an increase margin of two cents a gallon to our customers and gives them an incentive to pick up the additional cost of handling ethanol and [sic] well as handling a new product, and that is how it is priced and used and this is how it is in our contract and that's how every retailer does his economics to decide if he wants to use the product or not.

The Court: That does not include the extra cost to the dealer to do the blending process and the extra cost of equipment?

The Witness: Right, so we have to get it under gasoline.

The Court: Does the 71 cents still give enough incentive?

The Witness: Yeah. We are selling all we can make at that price.

Q. I would now like to show you plaintiff's exhibit 7 and see what impact the loss of the Ohio credit would (p. 30) have on the pricing of the 90/10 blend ethanol.

A. We go back here again to the \$1.38 gross price and give a zero price to the Ohio credit plus the 60 federal which would now give us 78 cents net cost of ethanol which is seven cents higher than the price of gas.

Q. So if you look at plaintiff's exhibit 6 you compare that to the 53 cent cost to the use of state tax credit.

A. That's correct, so instead of being below gasoline you are above gasoline. So when you take the 78 cents and blend it in the 90/10 ratio, the total cost of blend is seventy-three-and-a-half cents compared to the 73 cents of gasoline, and to which you add to the cost of handling and the customers won't do that. There is plenty of other gasoline to buy and other ethanol in the market place and he would buy from another supplier so the customer would not in any sense have any economic incentive to buy from us and they won't.

Q. In some products one might look at a two cent differential or one cent differential and say that wouldn't make any difference, but what margin are we dealing with?

A. To a retailer, just to take on the 1,700,000 gallons we are talking about selling in Ohio, two-and-a-half cents which is the difference in these two examples. (p. 31) So

that's 17,000,000 gallons of product so that's about \$34,000 per month of cost to the retailer so you are talking about a very substantial amount of money.

Q. I just have a few more questions, Mr. Dierenfeld.

Who are the other major suppliers of ethanol to Ohio consumers?

A. South Point Ethanol which is located in Ohio; Archer Daniels Midland (ADM), which is the largest supplier nationwide is located in Illinois; and Pekin Energy, which is a joint venture of Texaco and Corn Products is also located in Illinois.

Q. Did you say ADM is the largest?

A. Yes, far and away.

Q. After the Ohio ethanol reciprocity credit program was implemented, would ADM still continue to get the 25 percent credit?

A. Yes.

Q. That would be because its state still has a similar tax credit program?

A. Yes, theirs is approximately four percent of their tax program so it is well above the 25 percent level.

Q. How about the out of state supplier, would it continue to receive the out of state credit?

A. Yes, they are located in Illinois as well.

(p. 32) Q. Naturally the South Point, as an Ohio producer, would receive it?

A. That's correct.

Q. Is the value of production of ADM able to take up the 1,000,000 a month you are selling?

A. For example, their smallest plant makes 90,000,000 a year and our largest plant will go 50,000,000, so their smallest plant is two times our size, so no problem.

Mr. Farrin: Objection, he can't state as to what the capacity of ADM is. He doesn't know for instance if all of their anticipated production is already contracted for, so I move to strike that answer.

The Court: I will sustain the objection unless there is another basis.

Q. Are you familiar with ADM's current marketing efforts?

A. Yes, we are competing with them.

Q. Are they an active competitor seeking to sell volumes beyond that currently being sold?

A. They are a very active competitor.

Q. Assuming what you know about the business, do you know anyone who is out actively trying to market ethanol that doesn't have ethanol production available to meet it?

A. At this moment in the market place, it is not (p. 33) supply constraints but rather it is demand constraints.

Q. How familiar are you with ADM?

A. Very familiar. I served as vice-chairman of the Renewable Fuel Association which is the Trade Associa-

tion for all of the ethanol community users and served on the board of directors with—

Q. You discussed this problem with ADM on many occasions?

A. We discussed reciprocity and well—there are limits as to what a Trade Association can talk about generally, so we don't talk about, I'm not privy to their marketing plans or their pricing plans, or in that instance I can't speak firsthand but I am familiar with their view of the ethanol industry and their need—for example—

Q. Well, I don't want you to go into hearsay, but are you personally familiar with their ability to supply any reduced supplier by yourself in Ohio? Do you have personal knowledge of that?

A. Yes, they are able to supply markets. In fact, Mr. Young, what I can tell you, is we have joined Archer Daniels Midland in filing an anti dumping petition against Brazil because they have plowed the market place so what we have in the market place is a very large supply of alcohol so you know, therefore, the ethanol (p. 34) production people, domestic qualified producers, are able to look for and are seeking new markets wherever they can find them. Ohio, because of the geographic location and the cost of transportation, is a very good market for our competitors.

Q. Based upon the testimony that you have given then with respect to how these credits work and what's happening in the market place, if either ADM, Pekin Energy or any of the other three suppliers in Ohio pick up your supply to Ohio customers, if you are driven out of

the market, will that mean Ohio will get any more tax dollars than they did before?

A. No, simply our share of the market will simply be taken over by another competitor.

Q. The people who supply it will receive the credit?

A. Correct.

Mr. Young: I have no further questions of this witness, Your Honor.

The Court: Cross?

What's the difference between alcohol and ethanol?

The Witness: My inner substitution of the two. Ethanol is an alcohol and in the development of the industry they became interchangeable. It is alcohol or (p. 35) ethanol and they are identically the same. I apologize for using them interchangeably.

CROSS EXAMINATION

By Mr. Farrin:

Q. Mr. Dierenfeld, you testified on direct examination that you have one major contract with an Ohio motor vehicle fuel dealer; is that correct?

A. That's correct.

Q. It is my recollection that you testified that that contract calls for a \$1,000,000 or 1,000,000 gallon delivery to that dealer per month?

A. Yes.

Q. With respect to that particular dealer, I would ask you whether or not it is your understanding, under the current position of the Department of Taxation with respect to the application of the current law that with respect to those, to the ethanol delivered to that particular motor vehicle field dealer, they will receive the full credit at least up until July 1 of 1985?

A. They will receive the full credit until July 1, and thereafter zero.

Q. Thank you.

With respect to Archer Daniels Midland, is that correct?

(p. 36) A. Uh-huh.

Q. I will refer to them as ADM. Are you familiar with or do you have personal knowledge of what their production costs per gallon of ethanol is?

A. No.

Q. So you don't know whether or not because of their size they would be able to undercut your company by reason of their lower production cost?

A. No, I'm not privy to their production cost.

Q. You testified late in the direct examination with respect to the impact on Ohio's tax receipts in relation to the imposition of the new statute, which is being challenged in these proceedings, that one of the other producers, but if not New Energy, will receive the credit and therefore there will be no impact on Ohio tax receipts or tax losses; is that correct?

A. In my judgment, that is correct.

Q. Just to clarify, I will ask you this question directly: Is it your understanding that credit is available to the producers of ethanol?

A. No, what the credit does is it is available to the ethanol that is produced and blended and sold in the state of Ohio. The origin of the ethanol determines the qualifications under the statute as to whether it is a qualified fuel and what the amount of the qualified fuel (p. 37) credit is under the Ohio statute. One of the determinants of what the value of the qualified fuel is the origin of the ethanol and the values that that state provides as its credit—

Q. My point was a simple one and merely to clarify the application of the tax laws. Is it your understanding that the credit is really one that is available to the motor vehicle fuel dealer who is the person who actually pays and assesses the tax?

A. It goes to the ethanol which is blended and sold by—and the tax is collected by a retailer.

Q. It was my recollection on direct examination that you testified that presently your delivery or production for delivery to Ohio is approximately 1,000,000 a month?

A. That's right.

. . .

BUDDY ADDIS

(p. 39) called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Young:

Q. State your full name, sir.

A. Buddy Addis.

Q. And would you state your address, please?

A. 416 North Main, South Bend, Indiana.

Q. What is your current employment, sir?

A. I'm financial manager, treasurer of New Energy (p. 40) Company of Indiana.

Q. How long have you served in that capacity?

A. Since September of '84.

Q. Would you give us a brief resume of your educational background?

A. I'm a graduate of Eastern Illinois University with a BS degree in accounting and currently hold a CPA certificate from the State of Illinois.

Q. What was your employment prior to your current employment at New Energy of Indiana?

A. Most recently I was employed for twenty-and-a-half years with O. S. Cereal Mill in Paris, Illinois, a dry corn mill.

Q. And prior to that?

A. I spent two-and-a-half years on staff with Peat, Marwick and Mitchell in Illinois.

Q. Would you briefly describe your duties in your present capacity at New Energy?

A. I am in charge of all of the accounting and financial functions for the New Energy Company.

Q. Do your duties in that respect include the preparation of monthly reports or analysis of the business?

A. Yes, sir, it does.

Q. What are the monthly reports that you or a more similar business would prepare each month?

(p. 41) A. The balance sheet, income statements, source and application of funds.

Q. That source and application of funds, would that be called a cash flow statement?

A. A cash flow statement is a little more detailed but we do generate cash for cash flow statements.

Q. Did I ask you prior to coming here to make certain computations as to the impact of various reactions to the enforcement of the Ohio Ethanol Reciprocal Credit Legislation.

A. Yes, sir, you did.

Q. When did you anticipate that your plant in South Bend will be ready for full production?

A. We anticipate full production in August of 1985.

Q. If one looked at your monthly statement prior to August of 1985, what would we see?

A. A cash flow wide prior to August of 1985 would be small losses, small cash flow losses.

Q. And are you making any payments on your principal at this time?

A. No, sir.

Q. When did the deed instruments call for the payment of principal?

A. The first payment on principal in our senior debt would be March of 1986.

(p. 42) Q. So I take it then you are paying interest only?

A. Interest only.

Q. Is there any reflection for depreciation yet in your monthly statement?

A. Not on cash flow statements, no; it is not on there.

Q. So without paying principal during this start-up period, you're experiencing small losses?

A. Small losses.

Q. Is that typical in a new, highly capitalized business?

A. No, that normal for businesses in start-up period.

Q. So once you reach your full production, assuming you do in August of '85, do you in the normal course of events prepare a projected cash flow statement for the rest of the year?

A. Yes, sir, I do.

Q. If there were no change in the Ohio Ethanol Legislation as it impacted upon New Energy, what would your bottom line show in your cash flow statement for August,

assuming that you produced and marketed your full product for that month?

A. My current August of 1985 projection would show a gain of about \$38,000.

Q. For that month?

(p. 43) A. For the month of August.

Q. Now what I have asked you to do is two things.

First of all, to make the assumption for that month of August with respect to the projected ethanol that would be sold in the state of Ohio that you would have to reduce the price by 25 cents per blended gallon, and if you made that assumption, because you lost the Ohio credit, that you attempted to reduce the price charged your customers by 25 cents per blended gallon or 25 cents per—

The Court: 2.5 cents.

Q. 2.5 cents per blended or 25 cents for a pure gallon, but if you reduce your price you charge by the Ohio credit you lost, did you readjust your monthly, your August monthly cash flow statement?

A. Yes, my August of 1985 cash flow statement then would show a loss of approximately \$397,000.

Q. That would be about \$397,000 per month?

A. Per month for the month of August only.

Q. Okay. I ask you then to make one other calculation. To assume that you worked out of your August 1985 cash flow statement, the production and sale of the 1,700,000 gallons of this sale of ethanol. In other words, instead of readjusting to this new law by reducing your prices

you say I won't sell in Ohio and back (p. 44) out of that your 1,700,000 gallons.

Did you do that?

A. Yes.

Q. What is the bottom line on your cash flow statement for August of '85?

A. A loss of 693,000.

Q. If you followed either course of action and found yourself in that position in the month of August of 1985, would you be able to make the interest payments on your debt instruments for the debt used to capitalize this facility?

A. No, sir.

Q. Are there clauses in your debt instruments as to what happens if you can't meet your—

A. Right, we would reach a default and all of the nastiness that follows a default. The bankruptcy and—

Mr. Young: I have no further questions of this witness.

The Court: Cross?

CROSS EXAMINATION

By Mr. Farrin:

Q. Mr. Addis, in these calculations or projections that you were asked to make by Mr. Young, did you pre-

pare (p. 45) anything in writing that detailed these calculations?

A. Yes, sir, I did.

Q. Do you have those with you today?

A. Yes, there were furnished to counsel.

Q. Would you tell me in your projections for the future without the credit of without the sales, these losses were projected I take it at, assuming the same production costs you have now?

A. That's true.

Q. You didn't take into consideration the possibility that there could be a reduced production cost?

A. Reduced production cost will come after the plant is beyond start-up stage and in full production. We anticipate possible savings in production because of—

Q. In Mr. Young's question he first stated anticipate full production. You indicate you anticipate full production in August of '85.

A. That's correct.

Q. Which seems to come within the period to which you are projecting?

A. Right.

Q. So you have stated it is possible within full production that you have reduced projection costs?

A. That's the same thing as me assuming production prices. I must work with what I have, what is guaranteed.

(p. 46) Q. That's my question. You are making assumptions based on current figures and not possible changes over the time period.

A. Excuse me, but these were entered as forecasts.

Q. That's what I am trying to clear up. These are not based on anything other than presumptions as to future—

The Court: I don't think we need to belabor this point but I don't think the figures are relevant. Whether they are a million or half a million off, I don't think that's relevant to the issues in this case. If you want to go into it, you can.

Mr. Farrin: Your Honor, very briefly then.

Q. I take it these projections would also differ if for instance we had a huge gasoline increase in the near future, like we had several years ago.

A. Increase in price?

Q. Yes.

A. Certainly.

Mr. Farrin: No further questions.

The Court: Did you prepare similar figures for the Indiana Legislature and the effect of their legislation?

The Witness: No, sir.

(p. 47) The Court: What has the Indiana Legislation cost the company? Projected in 1985?

The Witness: Projected in 1985, I don't think there would be a cost there that would affect us.

The Court: You are cut out of the credit and that has to have cut the company's Indiana sales, doesn't it?

The Witness: No, because everyone loses that, not just the New Energy company of Indiana.

The Court: Doesn't that put you in the same class?

The Witness: No, Indiana and Illinois.

The Court: No. In trying to be competitive with gasoline, once the credit goes off, it is difficult to compete for the 10 percent of ethanol other than gasoline; isn't that true now in Indiana?

The Witness: That may be possible but I think not.

The Court: Well, do you know if Indiana is going to change or has changed from its 30 or 35 percent figure with its credit off, whether that's anticipated to go down, the 35 percent figure possibly going down to zero?

The Witness: The 35 percent?

Mr. Young: They don't have the tie-in to the tax provision like Ohio does, Your Honor. Is that what you are talking about?

(p. 48) Mr. Farrin: The credit is going to be repealed as of July of '85 completely.

The Court: But I am speaking about the projected figure with the repeal of that as to the effect in Indiana. I thought there was a statement that at 30 percent or 35 percent Indiana has the highest use of ethanol in the country. Isn't that what was said?

The Witness: Yes, that's the Indiana usage of gas with ethanol; yes.

The Court: That's what I am saying. With the Indiana tax being cut off in July of 1985, did you do any anticipated projections of revenue post July 1 of '85 of the loss of dollars in Indiana as a result of the Indiana Legislation?

The Witness: No, sir.

The Court: Okay.

Mr. Young, do you have anything further?

REDIRECT EXAMINATION

By Mr. Young:

Q. What the judge is trying to point out, although I haven't asked you to project it, isn't it a fact as he was questioning you that in Indiana, in the future, assuming nothing happens to that Indiana Legislation and it can't be changed from now and the effective date. The (p. 49) people who sell gasoline there take a greater production of the market away from ethanol use because ethanol can't be competitive with them?

A. Yes, sir.

Q. So it is only natural to assume that what will happen in Indiana, the ethanol production that is enhanced by these credits will go down and sales of regular gasoline will go up?

A. Yes.

Mr. Young: That's why we brought up who lobbied for the legislation.

The Court: I understand.

Anything further?

RECROSS EXAMINATION

By Mr. Farrin:

Q. Mr. Addis, in light of the questions by Judge Crawford and by Mr. Young with respect to the effect of the repeal of the Indiana credit, you stated you haven't done any specific study on it. Could you give your opinion of the effect of it on the vitality of the company, assuming that Indiana credit is—or accepting the fact the Indiana company is—or the Indiana company will be repealed in whole out of July 1, 1985?

A. I really have nothing to base an opinion on (p. 50) for what would happen.

The Court: You made a statement that with Ohio's Legislation as of August of 1985, you can project a monthly loss of \$370,000,000. Is included in that figure a supposition that you are also going to lose money because the percentage of the 25 percent or whatever that are taking place in Indiana?

The Witness: No, sir.

Q. So what you are saying is the company, as a result of Indiana and Ohio, are going to be in a position—first of all I can't tell by your figures how you can even exist under Indiana's situation even if Ohio didn't change because you are going to lose money as of July as a result of Indiana, but the combined two—

A. Well, as counsel pointed out we hope as the planning goes on the efficiency of the plant and learning how to come up with better yields produce enough to come up by the time 1986 comes.

The Court: But you will lost customers in Indiana so you will have to sell more gas not only keep the gas that you have in Ohio and Illinois, but sell more gas to make up for the loss in Indiana which may not be projected in those figures.

The Witness: That's true.

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(p. 51) ROBERT E. REYNOLDS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Young:

Q. State your name.

A. Robert E. Reynolds.

Q. What is your employment?

A. I'm the marketing manager for New Energy Company of Indiana.

Q. How long has that been your position?

A. I joined them in October of '84.

Q. In order to qualify you to answer some of the questions I will put to you, I would like to ask about your prior employment prior to that time?

A. Immediately before that I was a special field manager for the Southland Corporation with Petroleum (p. 52) Products Division.

* * *

(p. 53) Q. Were you able to, in that capacity, to make (p. 54) observations with respect to what impact the change in a state ethanol tax credit law would have upon production or sales in a given state?

A. Yes, it was my job to determine market entry and market exit for ethanol blending.

Q. While you were serving in that capacity, did you have an occasion to see the discontinuance of, for example, of sales or production in a given state because of a change in ethanol credit laws?

A. Yes, in the state of Texas.

Q. What happened there?

A. The legislation was changed such that the exception was different in each quarter and caused a roller coaster effect. We couldn't determine what our buying price would be for the ethanol we were using to blend so we had to exit the program because of our inability to plan.

Q. So you discontinued then using ethanol in the state of Texas?

A. That's correct.

Q. Comparing that if you will with the situation that exists in Ohio during the period from January 1, 1985 until July 1 of 1985, where the credit with respect to the Indiana procedure will be variable each month, what impact does that have on the ultimate buyer of ethanol in Ohio?

(p. 55) Mr. Farrin: Objection. He's testifying from the standpoint of purchasers of ethanol and I don't believe he can speculate as to what, I don't believe he should be able to speculate as to what consideration they will give to this possible fluctuation of credit they will receive.

The Court: I will let him answer the question. You can cross examine him.

Q. You were the largest independent purchaser of ethanol in the United States?

A. That's correct.

Q. What impact then, based upon your personal experience, does a law which would require this fluctuation each month in the amount of credit have?

A. I would be reluctant to buy if I could not determine the sale price and exemption that I would get from a certain producer.

Q. But would you make any demand of the producer?

A. As a matter of course when I was at Southland we required written certification that if there was any loss of the tax exemption that we would be reimbursed by the supplier of the ethanol.

Q. Okay. Have you had any actual contacts from customers in Ohio subsequent to the enactment of the Ohio Legislation in that respect?

A. Yes, we have had some customers request that (p. 56) we—

Mr. Farrin: Objection, hearsay.

The Court: What's the purpose of the testimony?

Mr. Young: To demonstrate what impact this Ohio law is having on their ability to market in the state of Ohio.

The Court: Are you trying to get it in for the truth of the matter stated?

Mr. Young: No. If he has received a demand from the customer, the mere fact he received a demand from the customer seems to me would be relevant in this case? Why the customer made the demand—

The Court: I'm not saying it is not relevant, I just want to know why it isn't hearsay.

Mr. Young: Because it's just simply showing he has received demands from the customers.

The Court: Have you received demands from customers?

The Witness: Yes, I have.

Q. (By Mr. Young) Relating to the Ohio Legislation?

A. Yes.

Q. With respect to the period of time when you were a purchaser of ethanol, how important was the reliability or continued existence of a given producer to the subject of your willing to enter into contracts with him?

(p. 57) A. It's extremely important.

Q. How does that relate to the problem at hand with respect to the Indiana producer trying to sell in Ohio?

A. I would say the customer feels that we cannot survive selling at a price reduced—

Mr. Farrin: Objection, he is again speculating.

The Court: Sustained.

Q. I want you now to speak only of the situation when you were a buyer and the consideration you gave to the purchase of ethanol while you were a buyer.

Now, did the problem ever arise where there was some question as to the ability of a given producer to continue to serve your needs?

A. Yes.

Q. When that problem arose, what was your natural reaction as a buyer of ethanol?

A. To either seek a more stable supplier or to withdraw from the program.

Q. Now are you responsible for trying to market ethanol for New Energy of Indiana?

A. I am.

Q. And has the enactment of this Ohio Legislation created a problem for you in attempting to market it in Ohio?

A. Yes, it has.

(p. 58) Q. And what does the problem relate to?

A. There is concern that we will not be able to stay in the market place after July 1.

Q. Okay. Let's turn to the question that was asked by the court because it is a very real question here.

Mr. Direnfeld testified to a projected distribution of ethanol to Ohio to the tune of 35 percent of its total output.

A. That's correct.

Q. That it does have one very major contract customer.

A. Yes.

Q. Do you have any contract customers in Indiana?

A. No.

Q. Okay. So what percentage of your overall production is sold in Indiana?

A. Approximately 15 percent max.

Q. Okay. So the balance is sold primarily in Illinois and Ohio?

A. Yes.

Q. Now come July 1, 1985, when there is no longer the credit in Indiana—

A. Yes.

Q. —isn't it a fact that although it will affect all the other producers the same that your position via (p. 59) the regular gasoline distributors will be harmed?

A. I'm sorry, I don't understand the question.

Q. In other words, when you lose, when you consider the pricing formula that was identified by Mr. Drenfeld, when you lose that edge in Indiana, the credit—

A. Yes.

Q. —won't it be more difficult to price your product competitively with gasoline after you lose that credit?

A. Yes.

Q. What will New Energy have to do in order to stay alive if there is an inroad in that 15 percent production?

A. We would have to redistribute to other markets.

Q. So in other words you will need to sell more in Ohio and Illinois rather than less?

A. Yes.

Q. Okay. Now in terms of a suggestion that once you lose your credit in Ohio and we are speaking of a different problem, your competitive position via the other suppliers of ethanol who will continue to receive the credit—and when we talk about Indiana we talk about everybody's market position hurt—how far can you go in terms of the distribution of your ethanol product without running into transportation cost problems?

A. We basically can't exceed the three state market (p. 60) we are in now; Indiana, Ohio, and Illinois, before it becomes prohibitive.

Q. The freight becomes prohibitive?

A. Yes.

Q. Let's assume you want to go to Kansas. What kind of freight would we be talking about?

A. To Kansas, 12 to 14 cents minimum.

The Court: How about Michigan?

The Witness: To get to a major metropolitan market would be 12, 12 to 14 cents.

The Court: Same as Ohio?

The Witness: Yes.

Q. (By Mr. Young) Do you market in Michigan yet?

A. There is only a one cent exemption so the formula is different and it is below our capability to market at that price so we do not sell in Michigan.

Q. So as to confirm the question asked by the court as to the impact of the Indiana law.

A. That's correct, we have less than a fraction of a percent of sales in Michigan and we can't sustain sales in Michigan.

Q. So you have to increase your sales in both Ohio and Illinois or a very close state?

A. Or a very close state, yes.

. . .

(p. 63) Q. Would it be your opinion that the loss of the approximate 15 percent market of your product in Indiana would be a severe detriment to the ability of the company to survive?

A. If we did not have an alternative market to go to someplace with it, yes.

Mr. Farrin: I have no further questions.

REDIRECT EXAMINATION

By Mr. Young:

Q. In terms of the questions about limited demand, what has been the gross in the last 12 years in the ethanol market and then tell me what all of the national publica-

tions are projecting in terms of next year's growth in the market?

A. The market has increased to roughly 500 gallons of ethanol a day.

Q. Tell me last year what percentage of increase there was?

A. I can't tell you exactly but it was approximately 15 percent. Future demand, because of lead phase down pending through the United States Environmental Protection Agency indicates there would be increased demand for ethanol as a replacement for lead gas, all lead.

(p. 64) Q. So you anticipate the potential for increased markets?

A. Yes.

Q. In Ohio and Illinois there currently is a bar against further import of Brazilian ethanol?

A. In Ohio, yes.

Mr. Farrin: That's a legal question, Your Honor. I object.

Q. I don't want you to tell me what the law is. Are the Brazilian producers importing any additional ethanol currently to Ohio or Illinois?

Mr. Farrin: Objection, Your Honor.

A. No.

Mr. Farrin: He hasn't laid a foundation for the witness to answer that question.

The court: Overruled.

A. No.

Q. Then what is the projected increase in the demand for ethanol next year, approximately?

A. Approximately 10 to 15 percent.

Mr. Young: I have no further questions, Your Honor.

The Court: Anything further?

Mr. Farrin: Nothing further, Your Honor.

(p. 65) The Court: That's assuming the oil lobbyists don't go out and start knocking off one state at a time and knocking out tax credits, right?

The Witness: Yes.

The Court: All right.

Mr. Young: Your Honor, at this time, we would like to offer into evidence plaintiff's exhibits 1 through 7.

The Court: Any objection?

Mr. Farrin: No objection, Your Honor.

The Court: They will be admitted.

* * *

TRANSCRIPT OF PROCEEDINGS

March 29, 1985

(p. 4) BARRY DIRENFELD

called as a witness as on cross examination, being first duly sworn, testified as follows:

CROSS EXAMINATION

* * *

Q. Are you familiar with Indiana Public Law 11-1984 which has been codified as Indiana Code 4-4-10.1? It is commonly referred to as the Ethanol Fuel Production Incentive Grants Program?

A. Yes.

(p. 5) Q. Could you tell me your understanding of how that program works?

Mr. Young: Your Honor, for the record I would indicate an objection. We went into this, we started into this the last time and the court indicated it wasn't too interested in what happened in Indiana so we technically object; although on the other hand, we feel it demonstrates the retaliatory nature of the Ohio law, so if the court wants to hear it, fine, but we want to indicate an objection for the record on the grounds of relevance.

* * *

(p. 6) Mr. Young: I think the court is correct, but I (p. 7) don't want Mr. Farrin to indicate it was Mr. Drenfeld's—

The Court: Go ahead.

Q. (By Mr. Farrin) I will repeat the question, Mr. Direnfeld.

What is your understanding as to how that incentive program works?

A. In terms of its implementation?

Q. Yes.

A. My understanding is that the state has established a fund which is subject to an annual review, an annual appropriation process, and it establishes a mechanism for which an entity who's an eligible producer may apply for and receive a grant provided that producer has constructed an ethanol plant that creates a significant number of jobs,—and I think the number is 75 or 100, whatever the number might be—of jobs in a blighted area as formerly designated by the state and if that's the case that entity is then able to apply or eligible to apply to the State Department of Commerce who administers the grant, and you have to apply with a poster of the number of employees that you have. A certification as to the fact that it is in fact a blighted or formerly blighted area, that you have created the requisite number of jobs for the statute and in that case you become eligible to receive a grant.

The grant on its face created a 25 cent per gallon (p. 8) measurement in terms of magnitudes of how much they want to in terms of appropriate an amount to eligible entities.

In fact, however, the first year they decided that even though, because they have an annual appropriation pro-

cess, they appropriated only \$4,000,000 rather than the 13 they authorized, and said the grants would be at the rate of 10 cents rather than 25 cents for that year.

Those grants are eligible to any producer, ethanol production facility that qualified and it goes on a first come, first serve basis. Each month you must formally apply, state all of the certification I went through and in which case you would be eligible to receive, in this calendar year for example, 10 cents a gallon up to the expenditure of \$4,000,000 of state funds.

Q. Am I correct in understanding New Energy is an eligible entity under that program?

A. Yes, we applied for the grant and have been determined by the Department of Commerce to be eligible.

Q. Do you have personal knowledge as to whether any other, there is any other entity that has qualified for this program?

A. No, I don't.

Q. Are there any other ethanol producers in the state of Indiana that have plants located in the state of Indiana, to your knowledge?

(p. 9) A. No.

Q. So I can assume you are the only one who could qualify under the terms of the grant program?

A. I don't know, there are a lot of newspaper articles as to—there is a plant in—

Q. Please, just answer it.

A. You asked for my personal knowledge if anyone else applies and I don't think so.

Q. My question is, if the program is solely for ethanol and physically located in Indiana, there are no others—

A. To my knowledge, our entity is the only one who so far has been declared eligible.

Q. Thank you. And are you currently receiving grants under the program?

A. Yes.

Q. Now under that program, am I correct in my understanding that for each gallon of ethanol produced by New Energy, regardless of where it is shipped to, if it is used in Indiana or shipped to Ohio to blend in the making of alcohol, that you currently receive the 10 cents per gallon credit or grant?

A. Correct, it is a manufacturing grant.

Q. And the grant, does the grant, the price per gallon grant or the amount per gallon grant increase after (p. 10) July 1 of 1985?

A. I don't know the answer to that. On the statute it was to be 25 cents this year—

Q. Under the current statute?

A. No, I'm telling you under the current statute it was to be 25 cents per gallon this calendar year and in a rider that was put on the end, they decided to make it 10 cents this year. Under the statute again for the next year it would be 15 cents if you followed the face of the statute.

Q. That's all I'm asking.

A. No, but that's an important point because no money has been appropriated for the next year and I don't know what the level is going to be.

Q. But under the current statute the way it is now written, it goes up to 15 cents after July 1, 1985?

A. That's right, the current statute is 25 cents currently funded at the rate of 10, going 15 on July 1.

Q. Thank you. So currently New Energy is receiving 10 cents per gallon for ethanol, including that which is shipped to the Ohio dealers for the making of alcohol?

A. It is everything we have manufactured again.

Q. To your knowledge, are your customers in Ohio, that is motor vehicle fuel dealers in Ohio, currently receiving an Ohio credit for each gallon of ethanol that (p. 11) you distribute to them that they in turn use in making gasohol?

A. Yes, although it is in varying amounts.

Q. Do you have personal knowledge of what that amount is for the current month?

A. Yes. No, I don't. Well, the current month I believe is 22 cents or maybe 23 cents.

Q. If you don't know—

A. Somewhere between 22 and 24 cents except for my contract customers in which case pursuant to the Ohio statute it is 25 cents.

Q. So for all your contract customers. They are currently receiving the full Ohio credit?

A. That's correct.

Q. Do you have knowledge or an estimate of the percentage of your current shipments to Ohio dealers with which you have a contract?

A. Relative to my total production?

Q. Your total distribution in Ohio, what percentage of those total distributions in Ohio are to contract customers?

A. It would have to be an estimate. Approximately, oh, more than half, so probably 75 percent or something like that.

Q. Thank you. So to make it clear to the court (p. 12) let me summarize: you currently, for every gallon of ethanol that is produced by New Energy that is distributed or sold to Ohio motor vehicle dealers, New Energy receives a 10 cent grant from Indiana and the dealer receives an Ohio credit in the range of 22 to 24 cents for that gallon; is that correct?

A. For a non-contract.

Q. For non-contract?

A. That's correct.

Q. And for contract it is the 10 cent grant plus the full 25 cent credit currently?

A. Who receives it?

Q. The 10 cent grant.

A. To me, it does not go to the Ohio customer.

Q. No, I'm talking about the total credit for grants given for each gallon of ethanol produced. You receive 10 cents for each gallon under the Indiana grant program; is that correct?

A. Oh, yes.

Q. And your dealer to whom you deliver gets—

A. 25 cents, so he gets 25 cents and I get 10 cents.

Q. Assuming first of all that there was no Ohio reciprocal provision under the current law, after July 1 of 1985. Is it correct that New Energy would be receiving, at least under the current Indiana provision, 15 cents per (p. 13) gallon of ethanol produced?

A. Provided—well, that would be dependent upon what the appropriation is and would also then be further dependent upon what New Energy's production rate is for the current year.

Q. What I'm saying is under the current law that provides—

A. The current law doesn't provide any appropriation so what the current law says is you may spend up to \$35,000,000 to any qualified producers and they can pay out at the rate on its face of 15 cents per gallon; however, it is subject to whatever they want to appropriate. So for example if they provided \$4,000,000 like they did this year and I produced \$52,000,000 of capacity, then 15,000,000 gallons produced at the rate of 15 cents might only cover, if you averaged that out, it is substantially less than 15 cents. The answer is, I'm not being coy, I don't know.

Q. If they appropriate the sufficient funds you receive 15 cents?

A. Yes, if they appropriate 15 cents, then yes.

Q. Absent in Ohio reciprocity provision, the dealers to whom you distribute in Ohio will receive a 25 cent credit per each gallon they use in making gasohol?

A. That's correct, provided Ohio—yes.

* * *

(p. 15) Q. I want to make sure I understand exactly what it is New Energy is complaining about in this case. If I understand that, your complaint is limited to simply the reciprocity provision of the Ohio statute; is that correct?

A. That's correct.

Q. You are not making any challenge or any objection to the credit provision of the Ohio statute?

A. That's correct.

Q. And if I understand also your complaint, you are (p. 16) not contending that Ohio has prohibited, absolutely barred in some fashion, New Energy from selling its ethanol in Ohio; is that correct?

A. Barring by regulation?

Q. Yeah, said you can't sell in here.

A. Economically, the implication says yes but not on its face.

Q. They haven't said that you simply can't sell?

A. Not on its face.

Q. You are complaining about the effect of the reciprocity provision?

A. Yes, the effect is I can't sell.

Q. In fact if we look beyond your company, you would agree with me that the Ohio statute doesn't prohibit the sale of ethanol produced in other states other than Ohio in Ohio; does it, sir?

A. No, it doesn't prohibit it.

* * *

(p. 19) Q. Let's move on and talk just a little bit about ethanol. There are several benefits that result to the public from the use of ethanol blended with alcohol; are there not?

A. Yes.

Q. As a matter of fact when I got to looking through the exhibits that were used at the last hearing, your exhibit 2, there are several of those benefits listed in that exhibit; is that correct, sir?

A. Oh, yes.

Q. I wonder if you would just flip to what is page two, "performing for the 80's", do you see that?

A. Sure.

Q. Under "increasing profits" there are three or four things listed. Do you see those?

A. Uh-huh.

Q. I take it that you would agree that the use of ethanol when blended with gasoline increases the octane (p. 20) rating of gasoline by three points?

A. Right.

Q. And by doing that, that would extend the gasoline yield from each barrel of crude oil that we use?

A. Right.

Q. And I take it you would also agree that ethanol is the cost—and I think “the” is in all caps—the cost-effective replacement for lead as an enhancer in gasoline, and you would agree with that?

A. In our judgment, sure.

Q. Well in your judgement.

A. Yes. I’m sure if someone was selling something else they would say in their judgment it would be something else.

Q. I think you told Mr. Young on direct examination that you thought ethanol was the most environmentally benign substitute for alcohol in gasoline?

A. That’s my judgement.

Q. And I take it you would agree that there are major health benefits to the public from the use of ethanol incorporated in gasoline as opposed to the lead; wouldn’t you, sir?

A. Yeah, I would.

Q. And I take it that you would also agree with me, wouldn’t you, sir, that the use of ethanol as an octane (p. 21) enhancer and substitute for lead, that to encourage that use, that’s a reasonable goal for both the Federal Government and the State Governments?

A. I believe that to be so.

Q. And that’s true in regard to each of the benefits contained therein in exhibit 2 that you and I just talked about?

A. I think absolutely, I think that it is reasonable for the government to encourage the use of surplus agricultural waste to develop renewable energy in an environmental fashion, sure.

Q. Recently the EPA has concluded that lead has to be gotten out of gasoline much more quickly than originally recommended?

A. Correct.

Q. And it is a benign substitute for that?

A. In my judgment.

Q. You would agree that’s a reasonable health benefit that both governments, state and local, ought to be encouraging?

A. I think so.

Q. As I understand it, both the Federal Government and I think you said 32 state governments have tax credit programs, credits to the retailer, as we discussed, to give incentives for the use of ethanol blends with gasoline; (p. 22) is that correct, sir?

A. Right.

Q. I think you probably would agree with me that the best way to do that is to give tax credits to those retailers?

A. Not necessarily. That’s the way it has been generally used.

Q. That's the way both the Federal Government and at least 32 states have tried to encourage that use; is that correct?

A. Tax exemptions, yes. Frankly the Federal Government, there's been a wide array on the Federal Government's side. They have been—

Q. Wait, I don't think—

Mr. Young: Excuse me, if you ask a question, David, don't cut him off in the middle of the answer.

The Court: Mr. Young, however, there was no question pending when this witness was answering. Let's not have him offering answers to questions that are not pending.

Mr. Young: Then shouldn't he ask the court instead of interrupting the witness, Your Honor? I think that's the appropriate way.

The Court: Yes, it would be. Go on and ask the question.

(p. 23) Mr. Crago: Thank you, Your Honor.

Q. I don't have an easel so I will hold this here so we can all look at it. This was marked as exhibit 5 in the first hearing, correct?

A. Uh-huh.

Q. Either prepared by you or someone in your company?

A. Right.

Q. I just want to be sure about a couple of points. First, the price calculations and the return to New Energy

as shown on this chart, as I understand it, it is based on a contract that you had to sell a million gallons a month?

A. That is correct.

Q. Of ethanol to an Ohio blender; is that correct?

A. That's correct.

Q. And this calculation includes—

A. This calculation—

Q. Just a second, I'm asking the question.

A. I'm answering your first question. What that does, that chart is an illustration of how a contracting pricing formula would work. It does not represent an exact pricing formula under our contracts which, for confidential reasons, we did not disclose.

Q. You might make more or less than on here?

A. It may be different than what is on our contract, (p. 24) that does not replicate our formula.

Q. But this formula—let me back up a second then because I did misunderstand and forgive me, but I was relying on the transcript. I understood your earlier testimony to be that the price you were receiving in the market today—

A. Correct.

Q. —In Ohio was \$1.32 a gallon net to you.

A. That's correct.

Q. And that is your—

A. At that day.

Q. The price has gone up since then; hasn't it, sir?

A. That's correct.

Q. This calculation though that shows a break even point without being able to cover depreciation expenses, as I understand it, and without being able to pay principal debt service, included a 25 cent credit from Ohio?

A. That's correct.

Q. My question to you then, sir, is under that calculation shown on exhibit 5, even with the Ohio credit, you can't pay all your obligations; can you sir?

A. I would be able to break even on my current obligations. I have no principal obligations at this moment, no.

Q. Until March of '86?

(p. 25) A. Right, so between now and March of '86 there has to be a change in market conditions.

Q. But you couldn't pay your principal even if you got the full credit.

A. If market conditions didn't change.

Q. Now in the calculations you talked about in your earlier testimony, you came up with a cost for your ethanol of \$1.32 I think a gallon; is that correct? Do you want some—

Mr. Young: \$1.38.

Q. Cost of ethanol production—again, I'm referring to exhibit 5. Cost of ethanol production is approximately \$1.32 a gallon.

A. Net F.O.B. the plant.

Q. What does F.O.B. mean?

A. It would be the plant gate price. After I have backed out transportation cost, it is the price I would sell it for if someone were to pick it up in a truck at my plant.

Q. So I can understand how you got to \$1.32, if I took all the costs you had incurred—

A. Uh-huh.

Q. —except for depreciation and principal, so all of these costs at the end of the month—

A. Uh-huh.

(p. 26) Q. —whatever that number is—

A. Yes.

Q. —and divided it by the number of gallons you produce of ethanol only—

A. Uh-huh.

Q. —that would come out, at least at the time you did this chart, to \$1.32?

A. No, that's based on a full production run which would probably be in the month of June. At this rate our cost of production is substantially higher because we are still in the start-up phase.

Q. Is there anything else that you have deducted from your total cost before you divide your total production into that? Anything else you have taken out?

A. I don't understand the question.

Q. Well I understand that you weren't factoring depreciation or principal payments. Anything else you didn't include?

A. No.

(p. 30) Q. Mr. Farrin asked you some questions about Indiana's grant program for ethanol produced in Indiana. If I understood, after you got all through there, you are presently getting 10 cents a gallon for every gallon of ethanol you produce?

A. That's correct.

Q. And it is scheduled to go to 15 cents in July but you don't know if they are going to fund that or not?

A. That's correct.

Q. If I also understood correctly, the Indiana grant program as you explained it was adopted specifically to encourage the development of a local ethanol industry; is that correct, sir?

A. And create jobs in blighted areas and create industry which would have spinoffs. There is a preamble that I can get and read to you.

(p. 31) Q. You would agree whatever, the preamble says is the purpose the legislature had?

A. To do what the preamble said.

Q. And I take it those things you reviewed for me and are in the preamble, those are legitimate purposes for the legislature to have when they adopted this; would you say that, sir?

Mr. Young: We are not here to argue about the legislation in Indiana and we would be glad to go there and argue it, but that is not the issue in this case.

The Court: Sustained.

Q. Would you also agree with me, sir, the same statute to abolish tax credits for retailers and blenders in Indiana is the same bill that provided the credit for Indiana producers of ethanol?

A. The grant?

Q. The grant, that's correct.

A. There is the production grant incentive and they were melted together, yes, they amended different parts of the statute. I think it was a two-part bill.

Q. And then put into one bill?

A. I think so.

Q. That grant was enacted, I believe you told Mr. Farrin, in 1984?

A. Correct, I believe in March but I could check the (p. 32) date of the enactment.

Q. 1984 is sufficient for me. My understanding of the earlier testimony was that the construction of your facility in Indiana began in 1982?

A. That's correct.

Q. So the grant program, to encourage the things we have talked about, was enacted two years after you began construction and a few months before you began production.

Q. (By Mr. Crago) Can you tell me some of the identities of the principal competitors you have in ethanol production?

A. Oh, yes. I would say they would be Archer Daniels Midland, Pekin Energy Company, A. E. Staley.

Q. A. E. Staley?

A. Correct, South Point Ethanol and the Government (p. 33) of Brazil.

* * *

Q. Can you tell me where the—I know where South Point is located, that's here in Ohio. Where is Archer Daniels Midland?

A. Principally in Illinois. I think they have one in Iowa as well.

Q. How about Pekin?

A. Illinois.

Q. And A. E. Staley?

A. Their facility is in Tennessee, headquartered in Illinois.

Q. Sir, given the locations that you have just given to me, I take it would be fair for me to say that none of those competitors, Archer Daniels Midland, Pekin, (p. 34) A. E. Staley, or South Point qualify for the Indiana grant program?

A. Oh, I would say that's true since none of them produce in the State of Indiana nor are they located in a blighted area in Indiana so I'm sure they wouldn't.

Q. Based on what you told Mr. Farrin, wouldn't you also agree with me, sir, that after July 1, Indiana will no longer provide any incentive?

A. That's correct.

Q. To the use of ethanol?

A. That's correct, it is scheduled to go to zero.

Q. I take it you would agree with me, sir, that Ohio, through its credit program, is going to continue to provide incentives to the use of ethanol that blends with gasoline?

A. According to the statute, yes.

* * *

I take it you would also agree with me, sir, that the Ohio statute, including its reciprocity provision, doesn't provide any protection for Ohio ethanol producers from producers located in states that have credits; is that also correct?

A. Protection from?

Q. Correct.

(p. 35) A. Does it adversely affect the amount of the credit?

Q. Let me ask it this way—

A. No. I'm serious because it depends on what the credit is for the location of the other producers.

Q. Let me ask it specifically. You gave the the names of four people.

A. Right.

Q. Archer Daniels Midland, they get the full Ohio credit?

A. Depends on which plant.

Q. That comes out of Illinois?

A. No, one of their plants in Illinois is gas-fired and they would not qualify. Their Iowa plant probably wouldn't qualify and their Peoria plant probably would qualify.

Q. The Illinois plant that is gas-fired, that's not because of the reciprocity provision?

A. No, it is because of the coal-fire provision within the statute.

Q. How about Pekin?

A. Pekin, in my judgment, would qualify. I think they have coal-fired.

Q. How about A. E. Staley?

A. A. E. Staley would qualify, I believe, yes, I (p. 36) think they would.

Q. And I take it you would agree with me if those entities compete with you, they also compete with South Point Ethanol?

A. I would think so, yes.

* * *

(p. 38) Q. Let me try one more. Do you know whether or not the intervener, South Point, is one of the

parties that (p. 39) lobbied through the reciprocity provision in the Ohio legislation?

A. Yes, I do.

Q. How do you know whether they lobbied that through or not?

A. I'm aware from both direct conversations with representatives of South Point as well as one of the people we had watching the legislation told me.

Q. The gentleman here today representing South Point, do you know whether or not he is an officer with South Point?

A. I believe he is the general manager of South Point.

Q. Did he personally concede to you that he had helped lobby through this Ohio legislation?

A. Yeah, he had told me the reasons why they were lobbying so heavily for it is so they would put pressure on Indiana and perhaps me to lobby for some number in Indiana for them at the pump.

Q. Do you know whether or not you competitors are now trying to lobby a similar reciprocity provision in the State of Illinois?

A. Yes, legislation has been introduced with the same type of language Ohio just passed and it is being introduced by the representative of the—

(p. 40) Mr. Crago: I will object to legislation in Illinois.

Mr. Young: They first brought it up, it seems to me.

The Court: I said it before and I will say it again. I don't see the relevancy of who lobbied what or where. We are dealing with a piece of legislation and not the motivation of the people getting the legislation but we are dealing with whether the piece of legislation in the state of Ohio is constitutional or not. Let's not try and point the finger at who got it done. It is done.

Mr. Young: Okay, Your Honor.

Q. Is there any question inasmuch as you told me the 10 cent grant program in Indiana was factored into all of your calculations about which you testified to at the last hearing, is there any question but that if this reciprocity legislation in Ohio remains on the books that you will not be able to continue to supply your major contractors in Ohio?

Mr. Crago: Objection, leading.

The Court: Overruled.

A. There is no question, that is correct. I will not be able to do that if it is in effect. It is in effect but come July 1 on that contract I will not be able to do it.

• • •

(p. 41) Q. You were asked a question about other grant programs and perhaps my objection was improper because I think the question was only about state grants and you started talking about federal programs. Are there indeed federal programs that provide grants as distinguished from credits with respect to ethanol?

A. Yes.

Q. Tell me about them.

A. Well, there are two that bear really on our project. The first is a program administered by the (p. 42) Department of Energy which is a feasibility study grant program which is helpful in designing technology. They funded in our case 1.7 million dollars of our grant to help develop the technology and engineering of our facility. In addition to that, another grant available for this project, because of its impact both on the materials of agriculture and creating jobs in blighted areas and for minorities, was a urban action grant and it was giving a 9.9 million dollar development grant from the Department of Urban Development.

Q. You were asked to identify your competitors and I want to ask you one question about that.

With respect to South Point who you identified as a competitor, who is the major competitor of South Point?

A. Ashland Ohio.

Q. Do you have an automatic source of supply for Ashland gasoline stations?

Mr. Crago: Objection.

The Court: Sustained.

Q. Do you, of your own knowledge, know whether Ashland has any various ethanol supply arrangements with your two major other competitors being Pekin and ADM?

Mr. Crago: Objection, I don't know how that's relevant.

A. I don't know—

(p. 43) The Court: Sustained.

Q. Now with respect to Pekin, your other major competitor, do you know who owns Pekin?

A. I think the majority interest is owned by Texaco USA and Corn Products.

Q. And Kentucky Agriculture which is the ethanol supplier in Kentucky?

A. They are owned 75 percent by Chevron USA.

* * *

LAUREN HILL

(p. 45) called as a witness on behalf of the defendant, South Point Ethanol, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Crago:

Q. State your name, sir.

A. Lauren L. Hill.

Q. Where do you live?

A. Russell, Kentucky.

Q. Where is Russell, Kentucky?

A. Right across the river from Ironton, Ohio, in fact I can see Ironton from my window.

The Court: Is that about as good as my view out here?

(Laughter).

(p. 46) Q. Who do you work for?

A. South Point Ethanol.

Q. And what is your position there at South Point?

A. I am the general manager of South Point Ethanol.

Q. How long have you had that position?

A. For two years.

Q. Mr. Hill, I wonder if you can tell us briefly some of the responsibilities you have as general manager of South Point.

A. I report to a management committee made up of representatives of partners who own South Point Ethanol and under their direction I perform all of the general manager's functions, such as personnel, finance, marketing, raw material supplies, operations, engineering, similar to what the president of a corporation would do.

Q. Can you tell us what South Point Ethanol is?

A. South Point Ethanol is a joint venture partnership that was formed in 1981 to retrofit an existing chemical plant in South Point, Ohio, for the purpose of producing 60,000,000 gallons a year of fuel grade ethanol from food grain.

Q. Where is South Point?

A. At the southernmost tip of the state of Ohio near where Kentucky, West Virginia and Ohio come together on the Ohio River.

(p. 47) Q. You said that South Point is a joint venture. Can you tell us who the participants in that joint venture are?

A. Yes. They are subsidiaries of Ashland Ethanol, Inc., the Ohio Farm Bureau Synfuels Investment Company, Inc., Publicker Gasohol, Inc., and UGI Ethanol Development Corporation.

Q. When did South Point go into production, Sir?

A. We began producing in September of 1982.

Q. I wonder, sir, if you could tell us a little bit about the county and community where South Point is located.

A. It is located in Lawrence County, Ohio, and as I understand the most recent records, Lawrence County has the second highest unemployment rate in the state of Ohio. I think number one is Jackson County just north of Lawrence.

Q. How many people does South Point employ?

A. We have what we call a manning table which is all of the positions created for South Point Ethanol and that's 191 people. We have some vacancies in that table so currently we employ about 185 people directly and we also have outside maintenance contractors in the plant. Their work force varies but it runs 20 to 40 people.

Q. What is the total payroll in terms of dollars?

A. About \$6,000,000 a year.

(p. 48) Q. Can you tell us, sir, briefly the sources for some of the funds that South Point used to retrofit and operate this plant?

A. Okay. Well some of the existing facilities were donated by the partners. The partners also put up cash. They acquired a 24 and a half million dollar loan from the U. S. Department of Energy on a cooperative agreement

and then they had a 32 million dollar group of loans and 90 percent of that 32 million dollars is guaranteed by the Farmer's Home Administration. A portion of that and I believe the number is 23 and a half million dollars is on a note that is held by the public employees retirement system of the state of Ohio.

Q. Can you tell us, sir, what the capacity of production from South Point is?

A. The rated capacity, what we call the designed capacity, is 60,000,000 gallons a year of ethanol.

Q. Are you running at full capacity today?

A. Not quite. We are running in the neighborhood of 90 to 95 percent of capacity.

Q. Let me hand you, sir, what has been marked as defendant's exhibit C and ask you if you tell us what that is.

A. That's the exhibit—

Mr. Young: Your Honor, there is no jury here but (p. 49) it would seem to me that if we have a party here who's damaged by the Ohio legislation and seeking to demonstrate damage to challenge it that whether South Point is operating at a profit or loss and how many people it employs, I fail to see the relevance of that to these proceedings and I object for the record.

The Court: Let me hear what the testimony is and I will determine its relevance later.

Mr. Young: Thank you.

Q. Can you tell us what exhibit C is?

A. Exhibit C is a statistical summary of the economic impact that South Point Ethanol has on the economy of the state of Ohio.

Q. Are those functions reflected on exhibit C, are those an accurate summary of those statistics?

A. Yes.

Q. And the total expenditures down there, they are in fact on an annual basis?

A. Yes, and they depend on the numbers that you see.

Q. Sir, if I understand what's been testified to so far, one of the raw materials in the production of ethanol or in fact the only raw material is corn; is that right?

A. That's right, I would call corn the only real raw material that has changed in the process. We also use a large amount of coal as fuel, it is consumed to give us (p. 50) the energy we need to power our plants.

Q. Can you tell us in 1984 how much corn South Point actually purchased?

A. We purchased about 24,000,000 bushels during 1984.

Q. Can you tell us, sir, where the largest amount of that corn came from in 1984?

A. There were two states that were about equally tied as our largest sources of supply and that was Ohio and Indiana. We bought about 9,000,000 bushels from both of those states.

Q. Can you tell us, sir, where South Point sells its ethanol?

A. Well, we sell throughout, really throughout the Ohio River-Valley network of states. We have a majority of our sales in Ohio and Kentucky but we also have sales in Virginia, a little bit in West Virginia, Tennessee, Indiana, Illinois, Minnesota.

Q. Okay. Indiana?

A. Yes.

Q. Can you tell us where some of the terminals that South Point has are located?

A. We operate through a network of terminals: Vancport, Pennsylvania; South Point, Ohio; Viney Branch, Kentucky; Covington, Kentucky; Cincinnati, Ohio; Clarksville, Indiana; Louisville, Kentucky; Evansville, (p. 51) Indiana; Knoxville, Nashville, Tennessee; those are some examples.

Q. Let me hand you, sir, what has been marked as defendant's exhibit D and ask you to take a moment to look at that and tell me what that is.

A. Periodically our sales department sends notices of our prices at the various terminals out to our customers and this was the letter sent out on March 20th, 1985.

Q. That has a listing of the terminals that South Point sells from?

A. That's right.

Q. And the prices that you would sell your ethanol for at each of those terminals?

A. On that date until they are changed, yes.

Q. Can you tell us the difference between top off and transport, what those mean?

A. Well, the way I speak about them it is two different classes of trade. Top off are very small deliveries. For example, a truck will come into the terminal, or will buy in the terminal a load of gasoline. He will fill up his tanks with 90 percent gasoline and then move to the ethanol portion of the ramp and he will quote top off with 10 percent of ethanol and that's the traditional product that's been called gasohol. It is (p. 52) a mixture of 10 percent ethanol and 90 percent gasoline.

The other way we commonly do business is to sell a full transport truck load full of ethanol.

Q. Can you tell us in 1984 what percentage of your sales of ethanol were in Ohio?

A. In 1984 we sold, I believe the number was 41 percent of our sales of ethanol in the state of Ohio.

Q. Did you have, in 1984, competition in the state of Ohio from other United States based producers of ethanol?

A. Yes.

Q. Can you tell us who those were?

A. Archer Daniels Midland (ADM) and New Energy of Indiana.

Q. Have you made a comparison of your sales in Indiana during 1984 to your present sales this year in Indiana?

A. Yes.

Q. Can you tell us what that comparison showed?

A. It showed on a basis of percentage of our sales moving into Indiana that that percent had dropped about one-third between the year 1984 and so far in 1985.

Q. Can you tell us the reason for the decline of your sales in Indiana?

A. Well, I don't know that I could pinpoint a single (p. 53) reason. I just don't know.

Q. Okay. Does Indiana provide an incentive for the production of ethanol presently?

A. I understand Indiana does.

Q. Has South Point Ethanol ever received any incentive from the state of Indiana for the production of ethanol?

A. No.

Q. Are you familiar with the method used in Ohio and other surrounding states to encourage the use of ethanol in gasoline?

A. Yes. A number of states have offered some mechanism of forgiveness of a portion of their state taxes on the sale of gasoline if the retail seller of that gasoline will blend ethanol into the gasoline.

Q. If present law in Indiana is not changed after July 1 of this year, will there be any incentive to a retail customer or blender in Indiana to use ethanol?

A. No.

Q. Why don't you tell us some of the benefits that result—well, let me ask it this way: you were in the courtroom when Mr. Drenfeld answered some of my questions about the benefits of the use of ethanol; is that correct?

A. Yes, sir.

Q. Do you agree with his views on the public health (p. 54) benefits on the use of ethanol?

A. Yes, I would say so.

Q. Can you explain to us what his present system is for encouraging the use of ethanol?

A. Well, Ohio as the general example I gave before, offered a reduction in the state gasoline tax that otherwise would be due for the retail gasoline dealer to blend ethanol with his gasoline.

Q. How is the reciprocity provision in the Ohio statute, if at all, how does it encourage the use of ethanol?

A. Well, it encourages other state legislatures throughout the country to enact similar legislation to provide a tax credit to that retail gasoline dealer so that he will have an incentive to buy ethanol and blend it with the gasoline that he sells.

Q. Does Ohio's present system for encouraging the use of ethanol, including the reciprocity provision, does that protect South Point Ethanol from competition, from other domestic ethanol producers?

A. No, I don't think it protects South Point Ethanol.

Q. Why not?

A. Because other manufacturers are free to bring their product into the state of Ohio and market it. I don't (p. 55) see where it bars anyone from bringing ethanol into Ohio.

Q. Let's just use an example. You mentioned Archer Daniels Midland, correct? As a competitor?

A. Yes.

Q. Does a reciprocity provision preclude them from receiving the full benefit of Ohio's tax credit?

A. No. I think they are receiving it today.

Q. Now you were also present in the courtroom when Mr. Young asked Mr. Drenfeld some questions about you working in the Ohio legislature with regard to the statute at issue in this case, were you not?

A. Yes.

Q. Did you in fact testify before some committee at the Ohio Legislature with regard to this legislation?

A. Yes, sir.

Q. Do you know what committee it was?

A. I believe it was the Ways and Means Committee of the Ohio House.

Q. Do you remember when you testified?

A. I believe it was in the month of December of '84.

Q. Why don't you tell us just briefly what you told the committee?

Mr. Young: Well, yeah, I would like to hear it.

A. Okay. At that point the bill had been through the Senate and was in the House for consideration.

(p. 56) Q. Did it have the reciprocity provision with it?

A. I believe it did.

Q. What did you tell the committee?

A. In general I reviewed for them the development of ethanol tax incentives in the U. S., federally and at the state level, and encouraged them to pass this bill even though I didn't agree with 100 percent of the bill and in particular, I asked them to begin operation of the bill as soon as possible, to put it into effect as soon as possible. I believe I asked them to do that on January 1, 1985.

Q. Did you tell the committee about the benefits of the use of ethanol?

A. Yes, and as I was saying, I was reviewing the development of industry in this country and saying that the benefits that were brought out just before in the former testimony in this trial were the same benefits that I stressed when I talked to the House Ways and Means Committee saying that now it was the best, most cost effective replacement for lead in gasoline and at that time it was rumored that the EPA would be coming out with a faster lead reduction program, and that the industry needed incentives to use ethanol until such time as it began to be valued for its octane generating qualities.

Q. Did you tell them about the benefits of the (p. 57) South Point plant?

A. Yes, I stressed the development of the South Point project and used a table similar to defendant's exhibit C to stress the economic impact of the South Point plant.

Q. Did you ask that committee or anybody else in the Ohio legislature to protect South Point from competition from ethanol produced by other United States based producers?

A. No, sir.

Q. Did you ask the committee to include the reciprocity provision in the bill?

A. It was in the bill at that time if I remember and I spoke for passage of the bill as it was written at the earliest possible effective date.

Q. Would you tell the court why you did that?

A. In my opinion the strength of the ethanol industry in this country is that if it is marketed broadly throughout all of the states of the union or as many states as possible, and I felt that the bill as constituted helped to do that by providing an incentive, if you will, to other state legislatures to pass similar legislation.

. . .

(p. 58) CROSS EXAMINATION

By Mr. Young:

Q. Just a very limited number of questions. You have such a fine Southern accent that I shant try to cross examine you very hard.

A. That from South Point.

Q. When you mentioned the participants in your joint venture at South Point, let's see, Ashland was one of them, farm bureau and was Publicker the name of it?

A. Yes.

Q. Was that Publicker Chemical Corporation?

A. I think the name is Publicker Industries.

Q. Oh, yeah, Publicker Industries. Fine. When you testified before the General Assembly with respect to this reciprocity legislation, did you advise them that one of your principals had been the plaintiff in Florida in the lawsuit that declared reciprocity unconstitutional?

A. No, sir.

Q. You knew that though, didn't you?

A. Yes.

Q. Okay.

A. Can we go back to that question a minute?

Q. Yes. Did you want to—

A. I thought my knowledge of the case in Florida was that it had to do with domestic and I thought that—come (p. 59) to think of it now I thought that Publicker's argument was you could not restrict the sale using the word "domestic" only.

Q. Well, in any event the court has the citation to the case and Mr. Crago, you have seen that case, haven't you?

Mr. Crago: I have seen the case and I'm not sure reciprocity applies to that but I think the case is—

The Court: Mr. Young is just trying to get a little dig in. It has nothing to do with the—

Mr. Young: Your Honor, how could you say something like that?

(Laughter).

Q. At the time you testified before the General Assembly, Ohio already had an ethanol credit program, didn't it?

A. Yes, sir.

Q. What was happening with this new bill is that certain non-Ohio participants were being excluded from it—

Mr. Crago: Objection.

Mr. Young: I will reword it.

Q. In other words the credit, the ethanol credit bill was already in effect and you were lobbying to get it passed with the reciprocity provision in it?

A. Well, there was a law already in effect, yes. (p. 60) several changes were proposed in this new bill that was working its way through the legislature and one of those changes was the addition of the reciprocity clause but there were a number of others.

Q. Basically your support of the reciprocity clause was for the purpose of having Ohio pass legislation that would put pressure on Indiana to pass legislation?

A. Well, my support of the, including the reciprocity clause with all of these changes was as an incentive to all states to enact all legislation that would promote the sale of ethanol in their states.

. . .

(p. 61) The Court: When you rebuilt South Point, did you get tax incentives from the state?

The Witness: Your Honor, I was not involved in the project at that time because that was in 1981 that that

construction was going on, but to my knowledge the answer to that question is yes.

The Court: And you are still getting it?

The Witness: I don't think we are getting (p. 62) anything from the State of Ohio today.

The Court: Did they just give you one year?

The Witness: We pay property tax, if that's your question. The only thing we did get was on some equipment that went into the plant and I know in particular for the waste water treatment, you know, pollution control equipment, we did get forgiveness of I believe the sales tax on the purchase—

Mr. Farrin: Your Honor, could I speak to this? I think there may be some confusion in his response to your question with respect to tax exemptions which I can clear up because I represent the Tax Commissioner and understand specifically what he is speaking of, if you don't mind me—

The Court: I don't mind but my point is—

Mr. Farrin: There is a pollution control exemption for any manufacturing in Ohio for pollution control equipment and I believe that's the incentive he is talking about.

The Court: But my point is South Point is getting their stuff and New Energy is getting their stuff from Indiana.

Mr. Farrin: This is for all manufacturing and not specifically for ethanol plants.

The Witness: We had no special incentive of any (p. 63) kind for our plants that any other industry could not have gotten and that's my understanding coming in after the fact.

• • •

PLAINTIFF'S EXHIBIT 3

STATE OF OHIO
DEPARTMENT OF TAXATION
State Office Tower
P. O. Box 530
Columbus, Ohio 43216

January 28, 1985

Barry Direnfeld
New Energy Corporation
Suite 200
915 15th Street N.W.
Washington, D.C. 20005

Dear Mr. Direnfeld:

We are writing in reference to our telephone conversation concerning Ohio's ethanol credit.

Am. Sub. Senate Bill 334 was passed effective January 1, 1985. This bill defines qualified fuel as "Ethanol that is to be combined with gasoline to create a blend of not more than ten percent by volume of ethanol and that when so blended is used, sold or distributed as a motor vehicle fuel." (Methanol produced from coal is no longer a qualified fuel.) Ethanol is defined as "Ethanol produced through a coal-fired process from wood or the grain of a cereal grass and denatured in accordance with the United States bureau of alcohol and tax regulations." Ethanol produced in a manufacturing facility with an annual production capacity of less than 2,000,000 gallons and otherwise qualified for the credit does not have to be produced through a coal-fired process.

The bill also contains a reciprocity provision. Fuel containing ethanol produced outside Ohio will qualify for

the credit *only if* the ethanol was produced in a state that grants a credit for similar fuel containing ethanol produced in Ohio. (Such credit may be a motor vehicle fuel tax or sales tax exemption or refund.)

The bill further provides that a licensed Ohio motor vehicle fuel dealer may claim credit on alcohol that does not meet the new definition when such alcohol was purchased or acquired or held in inventory before January 1, 1985. The reciprocity requirement does not apply to such fuel. Enclosed is a copy of emergency rule 5703-11-04 which describes this in more detail.

Another change pertains to the amount of qualified fuel credit. As the federal government's credit increases, Ohio's credit will decrease and as the federal credit decreases, Ohio's credit will increase. Ohio's maximum credit is 35¢ per gallon. On February 1, 1985, the Tax Commissioner will compute Ohio's credit. As it now stands, Ohio's qualified fuel credit will be 35¢ per gallon for January. On February 1, 1985, it will drop to 25¢ per gallon and will remain there until the federal credit changes again.

We have checked with the Indiana Department of Revenue and have determined that the credit given in Indiana is the equivalent to 25¢ per gallon of ethanol. Based on this, ethanol produced by New Energy Corporation in Indiana and purchased on or after January 1, 1985, will only receive a 25¢ per gallon credit during January. Ethanol which falls under rule 5703-11-04, however, is not subject to the reciprocity provision and would receive a 35¢ per gallon credit during January.

Effective February 1, 1985, Ohio's credit will decrease to 25¢ per gallon. Unless Indiana's credit decreases (it is based on the retail price of gasoline), ethanol produced in Indiana will receive the same credit as other ethanol. We have been informed that the Indiana credit ends June 30, 1985. Therefore, Indiana produced ethanol will not qualify for credit in Ohio beginning July 1, 1985, unless it qualified under rule 5703-11-04.

If there are any further questions, please contact the undersigned.

Cordially,

/s/

Richard O. Beckner
Administrator
Excise, Motor Fuel and
Highway Use Tax Division
Phone: (614) 466-3794

ROB/ml
Encs: (as stated)

PLAINTIFF'S EXHIBIT 4

STATE OF OHIO
DEPARTMENT OF TAXATION
State Office Tower
P. O. Box 530
Columbus, Ohio 43216

February 7, 1985

Bob Reynolds
New Energy Company of Indiana
P.O. Box 2289
South Bend, Indiana 46680-2289

Dear Mr. Reynolds:

We are writing in reference to our conversation on February 5, 1985, concerning the Ohio motor vehicle fuel tax credit given for qualifying ethanol produced in Indiana.

The credit for February, 1985 will be 25¢ per gallon. Because of the reciprocity section in Am. Sub. H.B. 334, this may change as Indiana's credit changes on ethanol produced in Ohio. Since Indiana's credit is scheduled to only go through June 30, 1985, ethanol produced in Indiana but blended after June 30, 1985, will not receive the credit. This pertains to ethanol whether it was produced before or after June 30, 1985. The only exception would be ethanol that qualifies under rule 5703-11-04.

The Indiana credit is through a reduction in the state sales tax on gasoline sold at retail and dispensed through a metered pump. Gasoline, without ethanol, is subject to a 5% state sales tax. Gasoline blended with ethanol (gasohol) is only subject to a 2.5% state sales tax. This credit will be computed each month and Ohio licensed motor vehicle fuel dealers will be advised of any changes.

If we can be of any further assistance, please advise.

Cordially,

/s/

Richard O. Beekner
Administrator
Excise, Motor Fuel and
Highway Use Tax Division
Phone: (614) 466-3794

ROB/ml

PLAINTIFF'S EXHIBIT 5

THE COST OF ETHANOL PRODUCTION
is approximately \$1.32/GALLON
excluding cost of debt retirement and
depreciation.

Invoice Price of
Ethanol Per Gallon

- .73 Net average price for gallon of regular gasoline.
Ohio credit per gallon of ethanol.
- +.60 Federal credit per gallon of ethanol.
- 1.58 (Since the credit is collected by the retail
distributor, he would, after the credits, have
the same price as non-ethanol blend.)
- .20 Discount—incentive to induce customer
to use ethanol.
- 1.38 Delivered gross price of gallon of pure ethanol
paid by customer.
- .06 Average transportation cost from
South Bend to Ohio.
- \$1.32 New Energy's net FOB plant price per gallon
of ethanol.

CONCLUSION

This provides New Energy with only enough
revenue to cover interest payments, but not
principal or depreciation. There is no way it
could reduce ethanol prices further.

PLAINTIFF'S EXHIBIT 6

Incentive For Customer

1.38	Delivered price for gallon of ethanol.
— .25	Ohio credit per gallon of ethanol.
— .60	Federal credit per gallon of ethanol.
<hr/>	
\$.53	Net cost per gallon of ethanol after credits.
NOTE: This is \$.20 per gallon less than price of gallon of regular gasoline.	

GASOLINE/ETHANOL
BLEND ECONOMICS

All gasoline/ethanol blends consist of 90% gasoline and 10% ethanol. This table illustrates the value of blends to the retailer.

90/10 BLEND COST

53¢	Net ethanol price per gallon to customer	$\times 10\% = 5.3¢$
73¢	Net price per gallon for regular gasoline	$\times 90\% = 65.7¢$
<hr/>		

Net total price to
customer for gallon of
gasoline/ethanol blend. 71 ¢

Customer who purchases and blends ethanol will increase his margin by 2¢ per every gallon blend he sells compared to regular gasoline.

PLAINTIFF'S EXHIBIT 7

PRICE OF ETHANOL
WITHOUT OHIO CREDIT

\$1.38	Delivered price for gallon of ethanol
— 0	No Ohio credit.
— .60	Federal credit per gallon of ethanol.
\$.78	Net cost per gallon of ethanol.
<hr/>	

90/10 BLEND COST

78¢	Net ethanol price per gallon to customer	$\times 10\% = 7.8¢$
73¢	Net price per gallon for regular gasoline	$\times 90\% = 65.7¢$
<hr/>		
Net total price to customer for gallon of gasoline/ethanol blend.		73.5¢
<hr/>		

DEFENDANT'S EXHIBIT C

SOUTH POINT ETHANOL
STATISTICS

Production: 60MM Gallons Per Year of Ethanol
220MM Tons Per Year of Distillers
Dried Grains with Solubles (DDGS)

Investment: \$120MM +

	<u>\$MM</u>
Number of Employees: 191—Annual Salary of \$5.5 to \$6.0MM	6.0
Contract Maintenance Employees: 40-60 on Continuous Basis Estimated Annual Salary	2.1
Personal Property and Other State and Local Taxes	1.3
Feedstock Cost—Corn —24.0 Million Bushels Annually at 2.95/Bushel	70.8
Coal—180,000 Tons Per Year at \$30.00/Ton	5.4
Power—Annual Usage will be in excess of:	2.5
Other Services—Chemicals, Enzymes, Yeast, Maintenance, Materials and Equipment, Denaturants	11.6
Total Annual Expenditures	99.7

IN THE SUPREME COURT OF OHIO

NEW ENERGY COMPANY OF INDIANA,)	
	)	Case No. 86-784
)	
Appellant,	)	An Appeal from
	)	the Tenth District
v.	)	Court of Appeals,
	)	Franklin County
JOANNE LIMBACH,	)	Case No.
TAX COMMISSIONER, et al.,	)	85AP-340
)	
Appellees.)	

AFFIDAVIT IN SUPPORT OF MOTION
FOR EXPEDITED ARGUMENT

District of Columbia :
: SS
:

Donald Evans, being first duly sworn, deposes and states:

1. I am the Chief Operational Officer for New Energy Company of Indiana and positively state the following with respect to the appeal pending before the Supreme Court of Ohio.

2. Since July 1, 1985, New Energy has been prevented by the Ohio Reciprocal Tax Credit Amendment from selling any of the ethanol produced by it in the State of Ohio. The enactment of this Ohio legislation also forced it to cancel a supply contract with an Ohio customer for approximately 15% of New Energy's annual output.

3. This appeal was argued on an expedited basis before the Franklin Court of Appeals in June, 1985. New

Energy anticipated a decision within a reasonable time after arguments. The eleven-month delay between argument and decision placed New Energy in a very serious financial condition.

4. In order to market the volume of product previously sold in Ohio, New Energy has had to lease approximately thirty-four rail cars and incur substantial transportation costs to sell ethanol in places as remote as North Dakota, Utah and North Carolina. Marketing product in distant markets also negatively impacts cash-flow and increases the cost of money by substantially lengthening payment and delivery cycles.

5. New Energy's \$185,000,000 facility was designed on the assumption of maintaining a large percentage of sales by truck into the nearby Ohio market. New Energy had no way of knowing that Ohio would subsequently enact the Reciprocal Ethanol Tax Credit amendment which had the practical effect of barring Indiana-produced ethanol from the Ohio market.

6. Effective July 1, 1986, the Indiana sales tax exemption for *all* ethanol/gasoline blends was eliminated. Therefore, after July 1, 1986, New Energy's ethanol does not qualify for any credit in Ohio.

7. Effective June 1, 1986, the Illinois General Assembly reduced its ethanol tax exemption. This, in turn, prevents Illinois producers from competing with an Ohio producer on an equal competitive footing. The major competitor left, after New Energy was barred by the Ohio legislation, is ADM, and it will not receive the full Ohio exemption.

8. The Indiana legislature previously decided not to appropriate any funds for the fiscal year commencing July 1, 1986 for a grant program for New Energy. Thus, New Energy no longer receives any such grant funds.

9. For the foregoing reasons and because of the inordinate delay at the Franklin County Court of Appeals level, it is critical that New Energy receive the decision of this Court at the earliest possible date.

Further Affiant saith naught.

/s/ Donald Evans

Sworn to and subscribed before me on this 13th day of August, 1986.

/s/ Carolyn L. Cook
Notary Public

EXHIBIT 1

—
(SEAL)

STATE OF OHIO
DEPARTMENT OF TAXATION
STATE OFFICE TOWER
P. O. BOX 530
COLUMBUS, OHIO 43216
May 12, 1986

INFORMATIONAL RELEASE
TO: ALL LICENSED MOTOR VEHICLE FUEL
DEALERS
RE: QUALIFIED FUEL CREDIT

Due to a reduction in the *Illinois* ethanol credit, all qualifying ethanol produced in *Illinois* and blended from June

1, 1986 through June 30, 1986, will receive a credit of \$.20 per gallon. Also, the credit for qualifying ethanol produced in *Indiana* will receive a credit of \$.09 per gallon when blended from June 1, 1986 through June 30, 1986. We wish to remind you it is your responsibility to obtain a statement from the supplier of the ethanol as to the qualifications of the ethanol. Before claiming the qualified fuel credit on your monthly tax return, you must first determine where the ethanol was produced. Credits taken must be at the appropriate rate. The credit for qualifying ethanol produced in Ohio remains at \$.25 per gallon.

You will be notified of further changes on a calendar quarter basis. Our next notification will be mailed in early June and will cover qualifying ethanol blended from *July 1, 1986 through September 30, 1986*. Please Contact us if you have any questions.

Ohio Department of Taxation
Motor Fuel Tax Compliance Unit
P.O. Box 530
Columbus, Ohio 43216
Telephone: (614) 466-3503

EXHIBIT 2

(SEAL)

STATE OF OHIO
DEPARTMENT OF TAXATION
STATE OFFICE TOWER
P. O. BOX 530
COLUMBUS, OHIO 43216

June 10, 1986

INFORMATIONAL RELEASE

TO: ALL LICENSED MOTOR VEHICLE FUEL DEALERS

RE: QUALIFIED FUEL CREDIT

As stated in our informational release of May 12, 1986, changes in the qualifying ethanol credit would be reported on a calendar quarter basis. Therefore, credit for qualifying ethanol produced in *Illinois* and blended from *July 1, 1986 through September 30, 1986* will be \$.17 per gallon. Due to *Indiana's* elimination of their ethanol credit, Ohio will *not* give credit for ethanol produced in *Indiana* and blended on or after *July 1, 1986*.

We wish to remind you it is your responsibility to obtain a statement from the supplier of the ethanol as to the qualifications of the ethanol. Before claiming the qualified fuel credit on your monthly tax return, you must first determine where the ethanol was produced. Credits taken must be at the appropriate rate. The credit for qualifying ethanol produced in *Ohio* remains at \$.25 per gallon.

Our next notification will be mailed in September, 1986 and will cover qualifying ethanol blended from October 1,

1986 through December 31, 1986. Please contact us if you have any questions.

Ohio Department of Taxation
Motor Fuel Tax Compliance Unit
P.O. Box 530
Columbus, Ohio 43216
Phone: (614) 466-3503

EXHIBIT 3

IN THE SUPREME COURT OF OHIO

NEW ENERGY COMPANY)	
OF INDIANA,)	
)	
	)	Appellant,
)	
v.	)	Case No. 86-784
)	
JOANNE LIMBACH,)	
TAX COMMISSIONER, et al.,)	
)	
	)	Appellees.

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUPERSEDEAS AND TEMPORARY
INJUNCTIVE RELIEF

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Donald Evans, being first duly sworn deposes and states:

1. I am the Chief Operational Officer for New Energy Company of Indiana and positively state the following with respect to the appeal pending before the Supreme Court of Ohio.

2. This Affidavit supplements information supplied in my Affidavit in Support of Motion for Expedited Argument, filed before this Court on August 15, 1986.

3. The ethanol dealer credit program in Ohio which grants full credits to customers of the Ohio producer, but none to customers of New Energy continues to cause irreparable damage to New Energy's business.

4. Whereas we formerly supplied over one million gallons of ethanol per month to Ohio customers, our December 1986 shipments were approximately 40,000 gallons. This shipment was to a single unique customer who does not solicit competitive bids. Our Ohio business has, as a result of the amended Ohio ethanol credit program, fallen from approximately 20% of our total output to less than 1% of our total output.

5. After the notice of the Supreme Court of Ohio decision that the ethanol credit law was unconstitutional, New Energy immediately received revived interest from potential Ohio customers. After the notice of rehearing became public, that interest again dissipated. Notification of the actions taken by the Supreme Court received industry-wide publicity in *Alcohol Update*. Copies of the pertinent page of that publication reflecting notices of this Court's action are attached as Exhibit A.

Further Affiant saith naught.

/s/ Donald Evans

Sworn and subscribed before me on this 4th day of February, 1987.

/s/ Nancy L. Johns
Notary Public
Resident: Shelby Co.
Commission Expires: 7/18/90
